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No.

In the Supreme Court of the United States

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, PETITIONER

v.

LISA L. FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As a prerequisite to bringing suit against a federal employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the aggrieved party must contact an Equal Employment Opportunity counselor within 45 days of the conduct alleged to be discriminatory. See 42 U.S.C. 2000e-16(b); 29 C.F.R. 1614.105(a). The question presented in this case is whether the court of appeals erred in holding that such a plaintiff may bring suit for discriminatory conduct that occurred outside the 45-day period, if such conduct was part of an ongoing policy or practice of discrimination that continued into the 45-day period.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Postmaster General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-58a) is reported at 251 F.3d 345. The decision and order of the district court (App., *infra*, 59a-97a) are reported at 36 F. Supp. 2d 490.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (1994 & Supp. V 1999), provides in pertinent part:

> (a) * * *
>
> All personnel actions affecting employees or applicants for employment * * * in the United States Postal Service * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> (b) * * *
>
> Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.
>
> * * * * *

2. Section 1614.105 of Title 29 of the Code of Federal Regulations provides in pertinent part:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

* * * * *

STATEMENT

1. Section 717(a) of the Civil Rights Act of 1964 (1964 Act), as amended by the Equal Opportunity Act of 1972, requires all personnel actions by the United States Postal Service to be made without discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. 2000e-16(a) (Supp. V 1999). By virtue of Section 717(a), the Postal Service is under a requirement parallel to that imposed on private employers by 42 U.S.C. 2000e-2, which forbids similar forms of employment discrimination and is also part of Title VII of the 1964 Act.

Pursuant to its authority under Section 717(b) of the Act, the Equal Employment Opportunity Commission (EEOC) has promulgated regulations that require potential plaintiffs under Section 717 first to contact an Equal Employment Opportunity (EEO) counselor "in order to try to informally resolve the matter." 29 C.F.R. 1614.105(a); see 42 U.S.C. 2000e-16(b) (authorizing regulations). Under the regulations, potential plaintiffs must initiate such contact "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. 1614.105(a)(1). Like the charge-filing period established by statute for actions against private employers, see 42 U.S.C. 2000e-5(e), the counseling period is treated "as a statute of limitations and it is subject to waiver, estoppel and equitable tolling." *Boyd* v. *United*

States Postal Serv., 752 F.2d 410, 414 (9th Cir. 1985) (citing *Zipes* v. *TWA*, 455 U.S. 385, 393 (1982)).

2. Respondent was a letter carrier with the Postal Service in Lake Placid, New York until September 25, 1997. App., *infra*, 2a. She alleges that, beginning in August 1994, her direct supervisor made a series of unwelcome sexual advances toward her at work. Respondent alleges that she consistently rebuffed those advances, and they ceased in the spring of 1995. *Id.* at 3a-4a. Thereafter, respondent's supervisor allegedly became aggressively hostile toward her, often treating her more harshly than he treated either her male co-workers or two female co-workers who acceded to his sexual demands. *Id.* at 4a-5a.

In April 1995, respondent threatened to file an administrative complaint against her supervisor for sexual harassment. App., *infra*, 5a. Respondent also alleges that she asked the Lake Placid postmaster several times to intervene and stop the supervisor's misconduct, but he refused to do so. *Ibid.* Respondent further claims that, after almost 30 months of discriminatory abuse, her supervisor's hostile behavior culminated on September 25, 1997, when he yelled profanities at her, pointed his finger at her, and physically intimidated her. After that incident, respondent took medical leave and did not return to work. *Ibid.* Respondent claims that various psychological and medical conditions caused by her supervisor's repeated acts of sexual harassment rendered her unable to work after September 25, 1997. *Ibid.*

On October 24, 1997, respondent contacted a Postal Service EEO counselor, and she filed an EEO complaint with the Postal Service on February 2, 1998. App., *infra*, 6a. Respondent's EEO complaint alleged that her supervisor had conducted a campaign of

harassment and abuse against her, which created a hostile work environment and resulted in her constructive discharge. *Id.* at 6a-7a.

The Postal Service rejected all of respondent's claims. App., *infra*, 7a. It determined that, under 29 C.F.R. 1614.105(a)(1), respondent could not challenge alleged violations of Section 717 that occurred more than 45 days before she contacted an EEO counselor (*i.e.*, before September 9, 1997). App., *infra*, 7a. The Postal Service, however, investigated the merits of respondent's allegations relating to the period between September 9 and her alleged constructive discharge on September 25, 1997, and it found no actionable discrimination. *Id.* at 7a-8a.

3. On June 25, 1998, respondent filed a complaint against the Postmaster General of the United States in the United States District Court for the Northern District of New York, alleging sexual harassment, retaliation for her threat to file an EEO complaint, disparate treatment based on gender, hostile work environment, and constructive discharge. App., *infra*, 8a, 60a. The district court granted summary judgment for the Postmaster General on all claims. *Id.* at 10a.[1]

With respect to the claim of retaliation for respondent's threat to file an EEO complaint, the district court concluded that respondent had not presented any argument to that effect in her administrative complaint, and thus the claim had not been preserved. App., *infra*, 73a-75a. With respect to respondent's claims of disparate treatment and a hostile work environment, the

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[1] The named defendant in the suit was William Henderson, then Postmaster General of the United States. John E. Potter assumed that office on June 1, 2001, and accordingly he has been substituted as petitioner in this Court.

district court held that respondent could not hold the Postmaster General liable for incidents that had occurred more than 45 days prior to respondent's contact with the EEO counselor on October 24, 1997. *Id.* at 78a-79a.

The district court rejected respondent's argument that events before September 9, 1997, could support liability under a "continuing violation" theory. It found that doctrine inapplicable to respondent's case because she had not alleged any formal or widespread policy of discrimination. Thus, the district court held that the only cognizable event supporting respondent's harassment claim was the incident on September 25, 1997, in which respondent's supervisor yelled, cursed, and pointed his finger at her. The district court found that, without more, this incident was insufficient to constitute a violation of Title VII. App., *infra*, 83a-89a.

4. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. App., *infra*, 1a-58a. With respect to respondent's claim that she suffered retaliation for threatening to file an EEO complaint, the court of appeals agreed with the district court that the claim must be dismissed because respondent failed to preserve the argument in her administrative complaint. *Id.* at 38a. With respect to respondent's other claims, the court of appeals held that it was not necessary for respondent to allege a formal or widespread policy of discrimination in order to establish a continuing violation. *Id.* at 28a-29a. The court further determined that a repeated series of discriminatory acts could constitute a continuing violation, so long as the serial acts were not "qualitatively different" from one another. *Id.* at 34a. Finally, the court concluded that this type of continuing violation claim was sufficient to revive otherwise untimely allegations about

discriminatory acts that occurred more than 45 days before the plaintiff contacted an EEO counselor. *Id.* at 37a, 39a-40a.[2]

Applying those principles, the court of appeals held that respondent's claims based on her supervisor's sexual advances before April 1995 were "qualitatively different" from her claims based on the supervisor's later hostility, and, therefore, that the earlier claims could not form a continuing violation with the later claims. App., *infra*, 34a-35a. Similarly, the court of appeals found respondent's allegations that other employees received preferential treatment too few and too "isolated" from other alleged misconduct to be included within an overarching continuing violation. *Id.* at 38a-39a.

The court of appeals, however, found a continuing violation in respondent's allegations that her supervisor's acts of discrimination from April 1995 until September 25, 1997, created a hostile work environment and resulted in a constructive discharge. App., *infra*, 37a, 39a-40a. Aggregating the allegedly discriminatory acts without regard to whether they fell within the 45-day counseling period, the Second Circuit found that the "cumulative effect of [the supervisor's] constant abuse and unfair criticism" raised a genuine question of material fact sufficient to defeat the Postmaster General's motion for summary judgment. *Id.* at 40a. Accordingly, the court of appeals vacated the dis-

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[2] As an alternative to its holding that no formal policy was required for there to be a continuing violation, the court of appeals held that the district court's grant of summary judgment based on the non-existence of a formal Postal Service policy was erroneous because respondent had been denied discovery on the issue. App., *infra*, 30a.

trict court's judgment as to those claims and remanded for further proceedings. *Id.* at 40a-41a.

Chief District Judge Korman, sitting by designation, dissented from the panel's vacatur of the district court's judgment. App., *infra*, 41a-58a. In his view, the majority's broad application of the continuing violation theory "effectively nullifies the 45-day rule and the administrative scheme of which it is a part," *id.* at 44a, by allowing respondent's Title VII claims to proceed without regard for her knowing failure to make timely contact with an EEO counselor. Relying principally on the Seventh Circuit's opinion in *Galloway* v. *General Motors Service Parts Operations*, 78 F.3d 1164 (1996), as well as on Second Circuit precedent, Chief Judge Korman proposed that a plaintiff should not be allowed to recover for acts that occurred outside the limitations period unless he could not reasonably have been expected to sue before the limitations period expired. App., *infra*, 47a-51a.

REASONS FOR GRANTING THE PETITION

This case concerns application of the 45-day limitations period that governs suits against federal employers to an alleged series of discriminatory acts, at least one of which occurred within that period and many of which did not. The Second Circuit held, in relevant part, that proof of a series of discriminatory acts that are temporally connected and qualitatively similar demonstrates a continuing violation of Title VII and allows a plaintiff to proceed on claims that otherwise would be time-barred. App., *infra*, 28a-32a, 34a, 37a, 39a-40a. This Court has granted the petition for a writ of certiorari in *National Railroad Passenger Corp.* v. *Morgan*, No. 00-1614 (June 25, 2001), to review the Ninth Circuit's application of the continuing violation

doctrine in the context of Title VII's provisions governing claims against private-sector employers. The petition in this case should be held pending the Court's decision in *Morgan*, and then should be disposed of as appropriate in light of the Court's decision in that case.

The plaintiff in *Morgan* claimed that during four and a half years of work for Amtrak he was the victim of a series of racially discriminatory employment practices, that Amtrak maintained a racially discriminatory work environment, and that he was retaliated against for activity protected by Title VII. *Morgan* v. *National R.R. Passenger Corp.*, 232 F.3d 1008, 1010-1014 (9th Cir. 2000). On Amtrak's motion for summary judgment, the district court held that all of the plaintiff's claims relating to conduct more than 300 days before the plaintiff filed a charge with the EEOC were time-barred under Section 706(e)(1) of Title VII, which requires an aggrieved plaintiff to file an employment discrimination charge with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1); *Morgan*, 232 F.3d at 1014. The Ninth Circuit reversed and held that, because the plaintiff had created a genuine issue of material fact as to the existence of a continuing violation of Title VII that persisted into the 300-day limitations period, "pre-limitations period conduct should have been presented to the jury not merely as background information, but also for purposes [of] liability." *Morgan*, 232 F.3d at 1017-1018. Amtrak challenges that holding before this Court.

In its brief amicus curiae in *Morgan*, the United States argues that Section 706(e) of Title VII incorporates the same "continuing violation" rule as other areas of civil law such as antitrust, torts, contracts, and the National Labor Relations Act (NLRA), 29 U.S.C.

160(b). See *Zipes* v. *TWA*, 455 U.S. 385, 395 n.11 (1982) (stating that time limitations under Section 706(e) should be treated in the same manner as those under the NLRA). Under that traditional rule, a plaintiff may recover for a violation that occurs within the limitations period, even if the plaintiff knew or should have known of the illegal course of conduct much earlier and outside the limitations period. But the plaintiff may not recover for violations that occurred outside the limitations period, even if they are related to the violations within the period. The decision in this case, like the Ninth Circuit's decision in *Morgan*, is inconsistent with that traditional rule.

The decision of the court of appeals in this case does not independently warrant plenary review if the Court issues a decision on the merits in *Morgan*. If, however, the Court holds in *Morgan*—consistent with the positions of the United States and the petitioner in that case—that pre-limitations acts may not form an independent basis for liability even when there is a continuing course of discrimination, then the court of appeals' judgment in this case should be vacated, and the case should be remanded for further consideration in light of the Court's decision. Although there are differences between the 45-day consultation period established in the EEOC's regulations and the statutory 300-day charge-filing period that is at issue in *Morgan*, this Court's application of the continuing violation doctrine in *Morgan* almost certainly will have a direct bearing on the Second Circuit's application of that same doctrine in this case. Furthermore, this case should be held for *Morgan* notwithstanding that the court of appeals remanded for futher proceedings in the district court. Otherwise, the parties may be required to

proceed with discovery and trial on claims that are time-barred.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, No. 00-1614, and should then be disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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AUGUST 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 99-6124

LISA L. FITZGERALD, PLAINTIFF-APPELLANT

v.

WILLIAM HENDERSON, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
DEFENDANT-APPELLEE

[Argued May 9, 2000
Decided May 31, 2001]

OPINION

Before: KEARSE and JACOBS, Circuit Judges, and KORMAN, Chief District Judge[1].

KEARSE, Circuit Judge:

Plaintiff Lisa L. Fitzgerald appeals from a judgment of the United States District Court for the Northern District of New York, Thomas J. McAvoy, then-*Chief Judge*, dismissing her amended complaint alleging that her employer, defendant United States Post Office ("USPS" or "Postal Service"), discriminated against her

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[1] Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

on the basis of gender, in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991 (1994 & Supp. IV 1998) ("Title VII"). The district court granted summary judgment in favor of the Postal Service on the principal grounds that (a) most of the alleged incidents underlying Fitzgerald's claims of hostile work environment and disparate treatment were time-barred; (b) the last incident complained of, though not time-barred, was an insufficient basis for those claims or for a claim of constructive discharge; and (c) Fitzgerald had failed to exhaust administrative remedies with respect to her claim of retaliation. On appeal, Fitzgerald contends principally that her claims based on earlier incidents were timely under the "continuing violation" doctrine; that her claim of retaliation was properly exhausted because it was so related to her other claims that it was within the scope of the administrative agency's investigation; and that the record was sufficient to allow her to pursue her claims of disparate treatment, retaliation, and constructive discharge. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

Fitzgerald, employed by the Postal Service, worked as a letter carrier at the Post Office in Lake Placid, New York, from 1986 until September 25, 1997. In August 1994, Timothy Gerling began working as a supervisor at the Lake Placid Post Office and had direct supervision of Fitzgerald. The present action centers on events alleged to have occurred in connection with Gerling's supervision of Fitzgerald. The following description, taken largely from various sworn documents submitted in the district court, views the events in the

light most favorable to Fitzgerald as the party opposing summary judgment.

A. *The Events*

1. *Sexual Harassment by Gerling*

From his August 1994 arrival at the Lake Placid Post Office until the spring of 1995, Gerling showered Fitzgerald with unwanted personal attention of a sexual nature, including the following. Each day he entered the cubicle in which Fitzgerald sorted mail, stood inappropriately close to her, blocked her exit, and laid his hand softly on her shoulder. He repeatedly shook hands with Fitzgerald in a way that was sexually suggestive, in both manner and duration, as he attempted to engage her in non-work-related conversations. He made inappropriate remarks about Fitzgerald's body and commented that she looked nice in shorts; he inquired about Fitzgerald's marriage; he told Fitzgerald that his own wife was "no fun." He repeatedly stared at Fitzgerald lustfully. He touched and ran his fingers through her hair. On at least one occasion Gerling embraced her.

Fitzgerald resisted Gerling's advances. He invited her to go dancing; she declined. He invited her to lunch; she declined. He told her he liked long hair; she promptly had her hair cut short. Fitzgerald attempted to make clear to Gerling that she was happily married and was not interested in having a sexual relationship with him. Gerling was not deterred. On several occasions, Gerling summoned Fitzgerald to his office, where he attempted to engage her in personal conversation. On one such occasion, Gerling removed his tie, began unbuttoning his shirt, and said to Fitzgerald, "I will

father your first child." Fitzgerald promptly left Gerling's office.

Fitzgerald told Gerling that his comments were inappropriate and made her uncomfortable. She asked him to stop coming into her work area, and she began to refuse to shake his hand. Gerling persisted. Fitzgerald complained to Lake Placid Postmaster Dennis King and asked him to stop Gerling from frequenting her cubicle and harassing her; King took no action.

In February or March 1995, Fitzgerald began to position mail gurneys at the opening of her cubicle in an effort to keep Gerling out. Gerling continued to summon Fitzgerald to his office, purportedly to discuss work, but in fact to attempt non-work-related conversations. On one such occasion, Gerling suggested to Fitzgerald that he would be willing to teach her "relaxation techniques."

2. *Gerling's Unwarranted Criticism of Fitzgerald's Work*

In the spring of 1995, Gerling finally ceased making sexual advances toward Fitzgerald. Instead, he turned hostile and, without any objective justification, began to shower her constantly with criticism about her work. From that time, on a continuing basis through 1996 and into September 1997, Gerling was aggressively hostile and increasingly abusive toward Fitzgerald in their day-to-day dealings. He excessively followed Fitzgerald on her postal route. Though Fitzgerald's work was exemplary, Gerling regularly and unfairly criticized her, berating her about her hours and productivity. He demanded more production from Fitzgerald and treated her more harshly than similarly situated male employees and than two other female employees

who had granted or were granting him sexual favors. Gerling criticized Fitzgerald whenever she worked overtime; he forced her to work unscheduled overtime.

Gerling also denied Fitzgerald her seniority rights in certain work assignments, forcing her to work when she was not scheduled to work so that a female employee with whom Gerling was having an affair, and to whom Fitzgerald was senior, would be free to travel out of town with Gerling. On one such occasion in April 1995, when Fitzgerald declined to work an unscheduled weekend, Gerling took disciplinary action against her by having Postmaster King write her a letter of warning. On receipt of that letter, Fitzgerald, *inter alia*, threatened to file an administrative complaint against Gerling for sexual harassment. Gerling withdrew the letter on April 20, 1995, but his face-to-face verbal abuse of Fitzgerald intensified.

On at least three occasions in the period 1995-1997, Fitzgerald asked Postmaster King to end Gerling's hostile and harassing behavior toward her. King rejected all of her requests for assistance. His response on one occasion was, "All you women do is complain."

Fitzgerald's ability to tolerate Gerling's abuse came to an end on September 25, 1997, after Gerling summoned Fitzgerald to a meeting for a discussion of her supposed failure to make her postal deliveries as expeditiously as possible. At that meeting, Gerling yelled profanities at Fitzgerald, thrust his finger close to her face, and physically intimidated her. That confrontation, which Fitzgerald terms the proverbial straw that broke the camel's back, caused her to be so distraught that she could not, despite her best efforts, continue to do her work. She left the facility and took sick leave. Since that date, she has been unable to resume her job.

B. *Fitzgerald's Administrative Complaint*

On October 24, 1997, pursuant to 42 U.S.C. § 2000e-16 and 29 C.F.R. § 1614.105 (2000), which deal with employment discrimination claims by federal employees, Fitzgerald contacted a Postal Service Equal Employment Opportunity ("EEO") Counselor in the USPS Human Resources Division ("HRD") to complain of Gerling's conduct. In early November, she completed an "Information for Precomplaint Counseling" form on which she summarily described her complaints about Gerling's unconsented touchings, suggestive remarks, and sexual overtures, and stated that "[w]hen I rebuffed him he retaliated." Fitzgerald filed under oath a formal administrative complaint ("EEO Complaint") with HRD in February 1998 (and later filed a more detailed supplemental complaint, also under oath), alleging "numerous acts of discrimination based on [Fitzgerald's] sex, continuing sexual harassment, retaliation, and hostile work environment" (EEO Complaint ¶ 20). The EEO Complaint alleged that Gerling had engaged in "a campaign of sexual discrimination and harassment" against Fitzgerald (*id.* ¶ 8), and that Fitzgerald had "rejected Mr. Gerling's unsolicited and unwelcome advances" (*id.* ¶ 9). It alleged that

> [b]ased on this rejection, Mr. Gerling embarked on a campaign of harassment and abuse against complainant. This intensive, severe, ongoing harassment and abuse was a direct result of complainant's sex and in retaliation for her rejection of his unwanted sexual advances.

(*Id.* ¶ 10.) The EEO Complaint also alleged that Postmaster King had repeatedly been made aware of Gerl-

ing's harassing and discriminatory conduct and had failed to take any steps to halt that conduct.

HRD, relying on 29 C.F.R. § 1614.105 (federal employee, before bringing a Title VII action against a federal agency, generally must contact an EEO counselor at the agency within 45 days after the allegedly discriminatory action occurred), and *id.* § 1614.107 (2000) (agency generally must dismiss claims of violations outside the 45 day period), rejected as time-barred Fitzgerald's complaints with respect to any events alleged to have occurred earlier than 45 days prior to her first contact with the EEO Counselor. Thus, HRD refused to consider Fitzgerald's claims that Gerling had sexually harassed her prior to April 1995 and that he thereafter had subjected her to a hostile work environment prior to September 9, 1997. HRD stated that

> [a]lthough more than one of the acts fell within the regulatory 45-day limitation period as a continuing violation, the record indicates you had prior knowledge or suspicion of discrimination months before you sought EEO counseling in that your attorney representative's correspondence states "postal service management has been made repeatedly aware of this situation." Further, a reasonable person in your position would have suspected discrimination months, even years, before you initiated EEOC counseling on October 24, 1997.

(Letter from HRD to Fitzgerald dated March 27, 1998 ("HRD Letter"), at 2.). HRD stated that it would investigate Fitzgerald's complaints of hostile work environment "during the period September 9 (45 days prior to counselor contact) through September 25, 1997 (last day worked)." (*Id.* at 3.) The letter advised

Fitzgerald of her right, within 90 days, to pursue the rejected claims in federal court.

C. *The Present Action*

Fitzgerald commenced the present Title VII action in June 1998. In July, HRD concluded its investigation of Fitzgerald's complaints of hostile work environment during the period September 9-25, 1997, and dismissed the remainder of her EEO proceeding. In August, Fitzgerald filed in the district court a Verified Amended Complaint ("amended complaint" or "complaint") alleging the events described in Part I.A. above.

The complaint alleged that Gerling's conduct subjected Fitzgerald to sexual harassment on the basis of her gender, and that as a result of both Fitzgerald's unwillingness to engage in a sexual relationship with him and her threat to file an EEO complaint against him, Gerling became increasingly hostile toward Fitzgerald and retaliated against her by constantly berating her and unfairly criticizing her work. The complaint asserted that Gerling's conduct was attributable to USPS because Fitzgerald had repeatedly complained about it to King, King knew that Fitzgerald was being retaliated against because of her refusal to have a sexual relationship with Gerling, and King took no remedial action. Fitzgerald alleged that as a result of Gerling's conduct and King's failure to intervene, she had suffered a total medical disability, forcing her to undergo regular and extensive medical treatment for, *inter alia*, a form of agoraphobia, sleeplessness, depression, and loss of nearly 25 percent of her body weight.

In October 1998, USPS moved for, *inter alia*, "[p]artial" summary judgment, arguing (1) that Fitzgerald had failed to exhaust administrative remedies on

her claim of retaliation, (2) that her claims based on incidents that occurred more than 45 days prior to her October 24, 1997 initiation of contact with HRD were time-barred, and (3) that within the final 45-day period there was no adverse employment action. In support of its first two contentions, USPS submitted copies of Fitzgerald's filings with HRD, including her two sworn EEO pleadings and her subsequent EEO affidavit. The substance of those documents was the same as the substance of her amended complaint, recounting the events described in Part I.A. above. The evidence that USPS submitted to support its third contention was scant. A 10-line affidavit from Gerling recited little more than his name, rank, and serial number. He recounted the date on which he began work at the Lake Placid Post Office, the fact that he had not known Fitzgerald theretofore, and his withdrawal of the disciplinary letter on April 20, 1995. He said nothing of his dealings with Fitzgerald on September 25, 1997, or during the preceding 45 days (whose events USPS did not contend were time-barred), or during the more extended period of alleged continual harassment, or during the early period of alleged sexual advances. Gerling also said nothing about the quality of Fitzgerald's work. USPS submitted no affidavit from King and presented no evidence to counter Fitzgerald's assertion that she had repeatedly complained to King of Gerling's harassing conduct, nor any evidence to suggest that King had taken any step in response to her complaints.

Fitzgerald opposed the summary judgment motion, contending, *inter alia*, (1) that her retaliation claim was exhausted because it was reasonably within the scope of HRD's investigation of the claims she had asserted before the agency, (2) that even the earliest incidents of

which she complained should be considered under the continuing violation doctrine, and (3) that she had sufficiently asserted that debilitating harassment had occurred over a period of some three years. Fitzgerald also requested that the summary judgment motion not be considered before she had an opportunity to conduct discovery.

In a December 29, 1998 opinion reported at 36 F. Supp.2d 490, the district court granted summary judgment dismissing the complaint in its entirety. As a procedural matter, the court found that discovery was not necessary because Fitzgerald had the information she needed in order to oppose summary judgment:

> Rule 56(f) is not appropriate where the discovery allegedly desired 'pertains to information already available to the non-moving party.'" . . . . Here, Plaintiff alleges numerous grounds in her Title VII claim against Defendant. She should, therefore, be able to demonstrate, at the very least, a material issue of fact to defeat summary judgment through her own affidavit, and by relying on her own witnesses and documents. Accordingly, Plaintiff has failed to show that summary judgment is premature under Rule 56(f).

36 F. Supp.2d at 497. The district court also appeared to accept assertions in USPS's motion as true because, in opposition, Fitzgerald "ha[d] not . . . submitted an affidavit stating her version of the facts giving rise to the lawsuit." *Id.* at 496. The court stated that

> [p]laintiff's reliance on her Amended Complaint to refute the . . . declarations and documentary evidence in support of Defendant's motion for summary judgment is plainly improper. It is axiomatic that

when the moving party has supported the motion by affidavits and documentary evidence, the non-movant

> [M]ay not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [ ] Rule [56], must set forth specific facts showing that there is a genuine issue [of material fact] for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). Because Plaintiff failed to respond with affidavits or otherwise as required by Rule 56(e), the only question that remains is whether summary judgment is "appropriate"; that is, whether Defendant's evidentiary material establish[es] an absence of a genuine issue of material fact and that it is entiled to judgment as a matter of law.

36 F. Supp.2d at 497 (internal quote alterations in district court opinion).

As to the merits of the motion, the court ruled that most of Fitzgerald's claims of disparate treatment and sexual harassment were time-barred and that the only event timely challenged was Gerling's conduct on September 25, 1997. The court rejected Fitzgerald's contention that all of Gerling's allegedly sexually harassing or retaliatory conduct should be considered pursuant to the continuing violation doctrine, stating that Fitzgerald had failed to show a formal policy or widespread practice of discrimination:

> [T]he events that give rise to Plaintiff's hostile work environment claim occurred as early as October 1994. At most, Plaintiff's administrative charge and federal complaint describe "multiple incidents of discrimination" directed solely at Plaintiff, rather than a formal or widespread identifiable discriminatory policy or practice. *See Quinn* [*v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir. 1998)]; *Lambert* [*v. Genesee Hospital*, 10 F.3d 46, 53 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052, 114 S. Ct. 1612, 128 L.Ed.2d 339 (1994)]. Indeed, many of the allegations supporting Plaintiff's hostile work environment claim address actions that occurred only once or on a few occasions. *See* EEO Complaint at ¶¶ 12-13, 16; Amended Compl. at ¶¶ 21-26, 32, 64-65, 71.

36 F. Supp.2d at 504. *See also id.* at 501 ("Plaintiff's claim, in its entirety, sounds in sexual discrimination and sexual harassment. She makes no allegations that Defendant maintained a retaliatory employment policy. Thus, Plaintiff's allegations of retaliation cannot be read to state a continuing violation claim.").

The court also concluded that Fitzgerald's claims of disparate treatment and hostile work environment, to the extent that they were timely, lacked merit because Fitzgerald "cannot show that she suffered an adverse employment action," *id.* at 503. The court noted that Gerling's alleged conduct at the September 25, 1997 meeting, yelling, using profanity, and behaving in a physically intimidating manner, was "in and of itself" insufficient to show a materially adverse change in the terms and conditions of Fitzgerald's employment. *Id.*

> The September 1997 incident is not sufficiently severe to constitute actionable sex harassment or

> constructive discharge. Indeed, Gerling's actions during that meeting neither drastically altered Plaintiff's working conditions nor compelled a reasonable person in her position to resign. Thus, Plaintiff has failed to establish a prima facie case of hostile work environment.

Id. at 504-05; *see id.* at 503 (same with respect to claim of disparate treatment).

As to Fitzgerald's claim of retaliation, the court concluded that it lacked jurisdiction because Fitzgerald had not asserted in the administrative proceedings that Gerling retaliated against her because of her threat to file an EEO complaint:

> In this case, Plaintiff filed her EEO Complaint on February 2, 1998, alleging "sexual discrimination and sexual harassment for the period October 14, 1994 to September 25, 1997." EEO Complaint, at ¶ 5. Plaintiff goes on to allege that "Gerling began a campaign of sexual discrimination and harassment against [Plaintiff]." *Id.* at ¶ 8. Notably, these statements fail to mention any reference to a claim of retaliation. Furthermore, Plaintiff failed to either mark retaliation as a type of discrimination alleged in her EEO Complaint or identify the prior protected EEO activity underlying such a claim. . . . A careful reading of the complaint evinces allegations of sexual discrimination and harassment against Gerling only. Thus, Plaintiff's EEO Complaint fails to adequately place Defendant on notice of potential allegations of retaliation.

Id. at 498. The court ruled that Fitzgerald stated no cognizable claim for retaliation in alleging simply that Gerling abused her as retribution for resisting his

sexual advances, reasoning that "rejection of sexual advances is not a protected activity":

> Plaintiff argues that "the underlying administrative complaint does allege that Gerling retaliated against [ ] Fitzgerald because she resisted his sexual advances." Pl. Mem. of Law at 18; EEO Complaint at ¶¶ 10, 15. This, however, is insufficient to establish a claim of prior protected EEO activity for which Gerling retaliated against the Plaintiff. *See Rashid v. Beth Israel Med. Ctr.*, 1998 WL 689931, at *2 (S.D.N.Y. October 2, 1998) (holding that rejection of sexual advances is not a protected activity under Title VII). . . .

36 F. Supp.2d at 498-99. The court concluded that such allegations as Fitzgerald had made in her EEO Complaint were not sufficiently related to her current claim of retaliation for participation in protected EEO activity to fit within an exception to the exhaustion requirement. *See id.* at 498-501.

Judgment was entered in January 1999, dismissing the complaint. Fitzgerald timely moved for reconsideration, contending that because USPS's motion had requested only "[p]artial" summary judgment, the court improperly dismissed the remainder of her complaint *sua sponte* without giving her an adequate opportunity to oppose. She also argued that the court should not have disregarded the allegations of her complaint since it was verified and thus should have been treated as an affidavit.

In an opinion reported at 36 F. Supp.2d 490, 505 (1999), the district court denied reconsideration. It stated that although USPS's motion was labeled one for "partial" summary judgment, its arguments had encom-

passed the entire complaint. Further, Fitzgerald could not validly contend that she lacked adequate notice, given that she had in fact responded to all of USPS's arguments. As to Fitzgerald's contention that the court should have treated her verified pleading as the equivalent of an affidavit, the court pointed to passages of its original opinion that cited various paragraphs of the amended complaint and indicated that it had in fact taken the complaint into account. Accordingly, the court concluded that "[t]reating plaintiff's Amended Complaint as an affidavit in support of her opposition to summary judgment does not yield a different result." *Id.* at 507.

This appeal followed.

II. DISCUSSION

On appeal, Fitzgerald contends principally (a) that the district court erred in concluding that the continuing violation doctrine did not require consideration of events that occurred prior to September 9, 1997, in connection with her claims of disparate treatment and hostile work environment; (b) that she presented adequate support for those claims and her claim of retaliation; and (c) that she should be allowed to pursue a claim of constructive discharge as well. For the reasons that follow, we conclude principally that summary judgment dismissing the sexual harassment claim with respect to the period August 1994 through April 1995 ("Phase I") as untimely was proper, but that summary judgment dismissing as untimely the claim of hostile work environment from April 1995 through September 25, 1997 ("Phase II") was error. We conclude that Fitzgerald's retaliation claim was properly dismissed to the extent that it was based on her threat to file an administrative complaint against Gerling. And we conclude

that the record reveals genuine issues of fact to be tried with respect to Fitzgerald's claims of hostile work environment, disparate treatment, and constructive discharge.

A. *Substantive Title VII Principles*

Most of the substantive principles pertinent to this appeal are well established. Title VII makes it an unlawful employment practice for an employer to discharge or discriminate against any individual with respect to conditions of employment, *inter alia*, on the basis of gender. *See* 42 U.S.C. § 2000e-2(a). This provision "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993) (internal quotation marks omitted). To establish a prima facie case of disparate treatment, a plaintiff must show, *inter alia*, that she was subjected to adverse employment action, under circumstances giving rise to an inference of prohibited discrimination. *See, e.g., Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).

1. *Quid Pro Quo and Hostile Work Environment Harassment*

A plaintiff seeking relief for sexual harassment may proceed on a theory of, *inter alia*, *quid pro quo* harassment. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 630 (2d Cir.), *cert. denied*, 522 U.S. 997, 118 S. Ct. 563, 139 L.Ed.2d 404 (1997). "[T]o establish a *prima facie* case of *quid pro quo* harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then

used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S. Ct. 2693, 129 L.Ed.2d 824 (1994). "It is enough to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for [such] a decision. . . ." *Id.* at 778; *see also Carrero v. New York City Housing Authority*, 890 F.2d 569, 577, 579 (2d Cir. 1989) (*quid pro quo* claim established where the plaintiff's refusal to submit to supervisor's sexual demands and her complaints against him resulted in deficient training and demotion).

Disparate treatment prohibited by Title VII also encompasses sexual harassment that results in a "hostile or abusive work environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986); *see also* Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (2000) ("EEOC Guidelines"); *id.* § 1604.11(a) (sexual harassment includes "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"). In order to prevail on a claim of hostile-work-environment sexual harassment, a plaintiff must establish two elements.

First, she must prove that the harassment was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21, 114 S. Ct. 367 (internal quotation marks omitted); *see, e.g., Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 67, 106 S. Ct. 2399; *Perry v. Ethan Allen, Inc.*,

115 F.3d 143, 149 (2d Cir. 1997); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1041 (2d Cir. 1993). Title VII does not authorize a hostile work environment claim for conduct that was merely offensive, rather than sufficiently "severe or pervasive" that a reasonable person would find the environment hostile or abusive. *See, e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. at 21, 114 S. Ct. 367; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 67, 106 S. Ct. 2399 ("[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII.").

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris v. Forklift Systems, Inc., 510 U.S. at 23, 114 S. Ct. 367.

Second, the plaintiff must show a specific basis for imputing the hostile work environment to the employer. *See, e.g., Perry v. Ethan Allen, Inc.*, 115 F.3d at 149; *Karibian v. Columbia University*, 14 F.3d at 779; *Kotcher v. Rosa & Sullivan Appliance Center*, 957 F.2d 59, 62 (2d Cir. 1992). Although limited defenses may be available, an employer is presumed responsible where

the perpetrator of the harassment was the victim's supervisor. *See, e.g., Burlington Industries v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998); *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 441 (2d Cir. 1999); *Perry v. Ethan Allen, Inc.*, 115 F.3d at 152-53. If the supervisor's harassment did not culminate in a "tangible employment action," *Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765, 118 S. Ct. 2257; *see Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 294 (2d Cir. 1999) (constructive discharge, *see* Part II.A.2. below, is not considered a "tangible" employment action for these purposes), *cert. denied*, 529 U.S. 1107, 120 S. Ct. 1959, 146 L.Ed.2d 791 (2000), an employer may avoid liability if (a) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765, 118 S. Ct. 2257; *see Faragher v. City of Boca Raton*, 524 U.S. at 807-08, 118 S. Ct. 2275; *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 767 (2d Cir. 1998). Those circumstances constitute an affirmative defense on which the employer has the burden of proof. *See, e.g., Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765, 118 S. Ct. 2257.

2. *Adverse Employment Action*

Adverse employment actions include discharge from employment. Such a discharge may be either an actual termination of the plaintiff's employment by the employer or a "constructive" discharge. *See, e.g., Chert-*

kova v. Connecticut Life Insurance Co., 92 F.3d 81, 89 (2d Cir. 1996).

> Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily.

Id.; *see, e.g.*, *Kader v. Paper Software, Inc.*, 111 F.3d 337, 341 (2d Cir. 1997).

> To find that an employee's resignation amounted to a constructive discharge, "the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."

Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 73 (2d Cir. 2000) (quoting *Lopez v. S.B. Thomas*, 831 F.2d 1184, 1188 (2d Cir. 1987) (other internal quotation marks omitted)).

Even absent a discharge, invidious harassment that did not make the plaintiff's job unendurable or intolerable may support a claim of hostile work environment if the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21, 114 S. Ct. 367 (internal quotation marks omitted). "While a mild, isolated incident does not make a work environment hostile, the test is whether 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse*.'" *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d at 70 (quoting *Torres v. Pisano*, 116 F.3d at

632 (emphasis in *Whidbee*)). "The effect on the employee's psychological well-being is . . . relevant to determining whether the plaintiff actually found the environment abusive," though no one factor is determinative under the objective standard. *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23, 114 S. Ct. 367. The victim's psychological well-being need not be damaged in order to find a hostile work environment; "[t]he fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases." *Torres v. Pisano*, 116 F.3d at 631.

3. *Retaliation*

Title VII also provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The " 'objective of this section is obviously to forbid an employer from retaliating against an employee because of the latter's opposition to an unlawful employment practice.' " *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276, 291-292 (2d Cir. 1998) (quoting *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988)). To prevail on a claim of retaliation in violation of Title VII, the plaintiff must show that she "engaged in protected participation or opposition under Title VII, that the employer was aware of this activity, that the employer took adverse action against the plaintiff, and that a causal connection exists between the protected activity and the adverse action, *i.e.*, that a retaliatory motive played a part in the adverse employment action." *Sumner v. United States*

Postal Service, 899 F.2d 203, 208-09 (2d Cir. 1990); *see, e.g., Quinn v. Green Tree Credit Corp.*, 159 F.3d at 768; *Gallagher v. Delaney*, 139 F.3d 338, 349 (2d Cir. 1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1307 (2d Cir. 1995).

B. *Exhaustion and the Title VII Limitations Period*

Title VII requires that an employment discrimination claimant pursue administrative procedures before commencing a lawsuit and imposes a deadline for the initiation of such procedures. *See generally* 42 U.S.C. § 2000e-16; *Briones v. Runyon*, 101 F.3d 287, 289-90 (2d Cir. 1996). As indicated in Part I.B. above, federal employees are given 45 days from the date of the alleged discriminatory act in which to initiate administrative review of alleged employment discrimination. *See* 42 U.S.C. § 2000e-16; 29 C.F.R. § 1614.105. The 45-day period serves as a statute of limitations; thus, as a general rule, claims alleging conduct that occurred more than 45 days prior to the employee's initiation of administrative review are time-barred. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L.Ed.2d 234 (1982); *Downey v. Runyon*, 160 F.3d 139, 145-146 (2d Cir. 1998).

An exception to this rule is provided by the continuing violation doctrine. Under that doctrine, if a plaintiff has experienced a "'continuous practice and policy of discrimination, . . . the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it.'" *Gomes v. Avco Corp.*, 964 F.2d 1330, 1333 (2d Cir. 1992) (quoting *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 25 (2d Cir.), *cert. denied*, 474 U.S. 851, 106 S. Ct. 148, 88 L.Ed.2d 122 (1985)); *see also Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981) (con-

sistent pattern of discriminatory hiring practices from 1971 to 1975 held to constitute a continuing violation), *cert. denied*, 455 U.S. 988, 102 S. Ct. 1611, 71 L.Ed.2d 847 (1982). "If a continuing violation is shown, a plaintiff is entitled to have a court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996); *see, e.g., Lambert v. Genesee Hospital*, 10 F.3d 46, 53 (2d Cir. 1993) ("Under the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEO[ ] charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone."), *cert. denied*, 511 U.S. 1052, 114 S. Ct. 1612, 128 L.Ed.2d 339 (1994). Although the continuing violation exception is usually associated with a discriminatory policy, rather than with individual instances of discrimination, and although acts so "isolated in time . . . from each other . . . [or] from the timely allegations[ ] as to break the asserted continuum of discrimination" will not suffice, *Quinn v. Green Tree Credit Corp.*, 159 F.3d at 766, a continuing violation may be found "where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994).

If a claimant has failed to pursue a given claim in administrative proceedings, the federal court generally lacks jurisdiction to adjudicate that claim. *See, e.g., Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir.

1998); *Butts v. City of New York Department of Housing Preservation & Development*, 990 F.2d 1397, 1401-02 (2d Cir. 1993). Even as to a claim not expressly pursued before the administrative agency, however, the court has jurisdiction if that claim is "reasonably related" to those that the plaintiff did assert before the agency. *See, e.g., id.* A claim is considered reasonably related if the conduct complained of would fall within the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge" that was made, *id.* at 1402. Successive conduct that is part of a continuing wrong is by its very nature "reasonably related" to the earlier conduct. *Cornwell v. Robinson*, 23 F.3d at 706. However, a plaintiff may not rely on a continuing violation theory of timeliness unless she has asserted that theory in the administrative proceedings. *See, e.g., Miller v. International Telephone & Telegraph Corp.*, 755 F.2d at 25.

C. *Summary Judgment Principles*

A motion for summary judgment may not properly be granted unless "[1] there is no genuine issue as to any material fact and [2] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that, in addressing the first of these criteria, the district court's function is not to resolve questions of fact but solely to determine whether, as to any material fact, there is a genuine issue to be tried. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989); *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 57-58 (2d Cir. 1987). In making that determination, the court must resolve all ambiguities, and credit all factual inferences that could

rationally be drawn, in favor of the party opposing summary judgment. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249, 106 S. Ct. 2505; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

Further, especially in the context of a claim of discrimination, the court should not view the record in piecemeal fashion. *Cf. Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976) ("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts"). As discussed in Part II.A.1. above, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23, 114 S. Ct. 367; *see, e.g., Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d at 69 (vacating grant of summary judgment because "[i]n concluding that the plaintiffs had failed to demonstrate the existence of a hostile work environment, the District Court appears to have analyzed the alleged incidents of harassment without looking at the totality of the circumstances."); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) ("Determining whether workplace harassment was severe or pervasive enough to be actionable depends on the totality of the circumstances."); *Stern v. Trustees of Columbia University*, 131 F.3d 305, 314 (2d Cir. 1997) (jury "will be entitled to view the evidence as a whole in assessing whether there was impermissible discrimination").

If a rational juror could infer that a reasonable employee would have viewed a given series of events as materially worsening her working conditions, summary judgment dismissing her hostile work environment claim on the ground of lack of an adverse employment

decision is inappropriate. *See, e.g., Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d at 71 (where reasonable jurors may disagree as to whether the incidents of harassment "'would negatively alter the working conditions of a reasonable employee,'" "'the potential for . . . disagreement renders summary judgment inappropriate'" (quoting *Richardson v. New York State Department of Correctional Service*, 180 F.3d at 439)).

In general, a party opposing a properly supported motion for summary judgment is not entitled to rely solely on the allegations of her pleading, but must show that there is admissible evidence sufficient to support a finding in her favor on the issue that is the basis for the motion. *See* Fed. R. Civ. P. 56(e). Ordinarily, this means that a plaintiff must present affidavits, based on "personal knowledge, . . . set[ting] forth such facts as would be admissible in evidence," and as to which the affiant would be competent to testify. *Id.*

In the present case, although Fitzgerald did not submit an affidavit in opposition to USPS's summary judgment motion, *see* 36 F. Supp.2d at 496 ("Plaintiff . . . . has not even submitted an affidavit stating her version of the facts giving rise to the lawsuit"), the record reveals that there were four documents before the district court that were sworn to by Fitzgerald and presented her version of the facts. First, the amended complaint in the present action was verified. In the verification, Fitzgerald stated under oath that the pleading was "true to [her] own knowledge, except as to matters alleged upon information and belief." (Fitzgerald Verification, sworn to August 19, 1998.) This verification was the equivalent of the oath that would be given with respect to an affidavit. Thus, to the

extent that the amended complaint asserted factual matters other than on information and belief, Fitzgerald was entitled to rely on it in opposing summary judgment.

In addition, the district court had before it Fitzgerald's EEO Complaint, her supplemental EEO complaint, and her EEO affidavit. Each was sworn to by Fitzgerald and, like the verified amended complaint, each presented her version of the events. The fact that they were submitted by USPS did not mean that they could not be relied on by Fitzgerald. To the extent that the four documents that were sworn to by Fitzgerald, and that were before the court on the motion for summary judgment, stated, other than on information and belief, facts as to which Fitzgerald was competent to testify, the court was required to accept their factual assertions as true and to draw from them all inferences that could reasonably be drawn in Fitzgerald's favor.

In granting USPS's motion for summary judgment, the district court referred several times to allegations of the amended complaint, as well as to allegations of Fitzgerald's EEO Complaint. But as discussed below, we conclude that the court did not take the sworn documents, or the inferences that could be drawn from them, in the light most favorable to Fitzgerald.

D. *Application of the Legal Principles to Fitzgerald's Claims*

Analyzing the record within the above legal framework, we conclude that Fitzgerald's claim for sexual harassment prior to April 1995 (*i.e.*, Phase I) was properly dismissed as time-barred; that the claim of preferential treatment during Phase II for the two female employees with whom Gerling had affairs was also

time-barred; and that the claim for retaliation was properly dismissed for lack of exhaustion only insofar as it was based on her threat to file an administrative complaint. Fitzgerald's claim of hostile work environment during Phase II, *i.e.*, after Gerling became abusive in April 1995, along with her embedded claim that Gerling retaliated against her in Phase II for rejecting his advances, were timely under the continuing violation theory; and Fitzgerald proffered sufficient admissible evidence to warrant a trial on these claims and on her claim of constructive discharge.

1. *Application of the Continuing Violation Theory to Phase II*

The district court ruled that Fitzgerald was not entitled to invoke the continuing violation theory

> because she has not alleged an "ongoing discriminatory practice or policy" in her administrative complaint. . . . Rather than detailing specific instances evincing a *formal* discriminatory practice or policy, Plaintiff merely alleges hostile behavior by Gerling directed solely at Plaintiff for rejecting Gerling's sexual advances.

36 F. Supp.2d at 502 (emphasis added); *see also id.* at 504 (no showing of "a *formal or widespread* identifiable discriminatory policy or practice" (emphasis added) (internal quotation marks omitted)). Insofar as Fitzgerald's claim alleging a hostile work environment from April 1995 through September 25, 1997, is concerned, we have doctrinal, factual, and procedural difficulties with this ruling.

Most fundamentally, we disagree with the assumption that Fitzgerald could not avail herself of the continuing violation theory unless she could prove that

USPS had a "formal" discriminatory practice or policy. As discussed in Part II.B. above, even where there is no formal policy, the continuing violation theory may be used where there have been specific and related instances of discrimination, and the employer has permitted them to continue unremedied for so long that its inaction may reasonably be viewed as tantamount to a policy or practice of tolerating such discrimination.

In addition, we disagree with the view that Fitzgerald was not entitled to invoke the continuing violation theory without showing that the discrimination was "widespread." Although evidence that other female employees were subjected to the same type of harassment would be relevant, *see, e.g., Perry v. Ethan Allen, Inc.*, 115 F.3d at 150-51, the continuing violation theory may be applied where there is a showing of specific and related instances of discrimination against a single plaintiff, *see generally Cornwell v. Robinson*, 23 F.3d at 697, 704; *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1311 (10th Cir. 1999) ("[A] continuing violation may be based on either a series of related acts taken against a single individual or the maintenance of a company-wide policy or practice of discrimination."); *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480-81 (9th Cir. 1989) ("A continuing violation may . . . be established not only by demonstrating a company[-]wide policy or practice, but also by demonstrating a series of related acts against a single individual. . . . In the latter instance, the question . . . boils down to whether sufficient evidence supports a determination that the alleged discriminatory acts are related closely enough to constitute a continuing violation." (internal quotation marks omitted)).

We also note that if there were a requirement that a plaintiff show "a formal policy or that discrimination was 'widespread,'" 36 F. Supp.2d at 504, we would conclude that the district court's reliance even in part on Fitzgerald's failure to make such a showing was at the very least premature. USPS's motion for partial summary judgment was made less than two months after Fitzgerald filed her amended complaint, and Fitzgerald requested that the motion not be decided before she had an opportunity to conduct discovery. The court denied her request, stating that Fitzgerald had personal access to all she needed to oppose summary judgment. Faulting Fitzgerald for failure to make a showing of a formal policy—or of other matters that would similarly be beyond her personal knowledge—was incompatible with the court's denial of discovery.

As to whether Fitzgerald made a showing of personal harassment sufficiently repetitious to support invocation of the continuing violation theory, we conclude that her sworn factual allegations of Gerling's constant stream of unjustified criticisms of her work described specific, related instances of harassment adequate to depict a continuity of allegedly unlawful conduct. Fitzgerald stated that "[a]fter the incidents of April and May[ ] 1995, and continuing through 1996 and 1997, Gerling became increasingly hostile and abusive toward plaintiff." (Amended Complaint ¶ 90.) She stated that he unjustifiably berated her about her hours and productivity; he attempted to force her to work overtime when she was not scheduled to work, and he criticized her when she worked scheduled overtime; he treated her more harshly than male employees and than two female employees with whom he had had or was having a sexual relationship. Fitzgerald alleged that

the harassment was "ongoing," "repeated," and "continuing" (EEO Complaint ¶¶ 10, 12, 20), occurring "day to day" (Amended Complaint ¶ 92), as Gerling "regularly and unfairly criticized" her work (*id.* ¶ 93) "repeatedly and on a continuing basis" (*id.* ¶ 91); she alleged that "[t]hese acts of hostility, criticism and harassment were severe and persistent and occurred on a continuing basis from April 1995 through September 1997" (*id.* ¶ 121). Thus, although the final abusive incident on September 25, 1997, was separated from Gerling's final sexual advances by a gap of nearly 2 1/2 years, Fitzgerald's assertions plainly alleged that there was no interruption in the allegedly unwarranted abuse to which she was subjected during that 2 1/2-year Phase II period.

The district court's view that "many of the allegations supporting Plaintiff's hostile work environment claim address actions that occurred only once or on a few occasions," 36 F. Supp.2d at 504, thus did not accept the above sworn statements in the light most favorable to Fitzgerald, either as to the quantity or as to the frequency of Gerling's abuse. We note also that it appears that Fitzgerald could, at trial, elaborate on the allegations of her pleadings. For example, in her answers under oath to interrogatories served by USPS (first submitted to the district court when Fitzgerald moved for reconsideration of the summary judgment decision), Fitzgerald gave additional examples of Gerling's abuse and disparate treatment of her, including constantly criticizing the length of time it took her to deliver her mail; yelling at her for parking improperly, when in fact her vehicles were properly parked; reprimanding her for leaving her work area, when she had a legitimate reason for leaving; and excluding her from work areas

in which other employees were allowed. (Fitzgerald Response to USPS Interrogatory 11.) Fitzgerald also stated that she could not be more precise as to the dates on which specific types of abuse occurred because Gerling abused her "on a daily basis." (*Id.*) Whether or not Gerling's harassment is ultimately found to have materially altered Fitzgerald's working conditions, that conduct surely is alleged to have been continuing.

The record is also clear that Fitzgerald sufficiently presented the continuing violation theory in her administrative proceedings before HRD. The agency described Fitzgerald's claim as asserting, *inter alia*, "a hostile work environment after rejecting Supervisor TG's unsolicited and unwelcome advances . . . *beginning in April 1995 continuing through September 25, 1997.*" (HRD Letter at 2 (emphasis added).) Although HRD declined to apply the continuing violation theory to Fitzgerald (*see id.* ("you may not avail yourself of the Commission's continuing violation theory")), the agency plainly understood her to have invoked that theory.

Finally, although the amended complaint was vague as to when Fitzgerald first complained to King about Gerling's conduct, her Response to USPS Interrogatory 7 indicated that she had complained to Postmaster King during Phase I; and the amended complaint made clear that she complained to him at least three times during Phase II, asking him to halt Gerling's harassing conduct. According to Fitzgerald, King refused to intervene and stated, "All you women do is complain." A jury would be entitled to credit Fitzgerald's testimony as to (a) Gerling's persistent harassment, (b) her repeated complaints to King, and (c) the lack of remedial action by King, whose sole response was to criticize the complainant for complaining. And it could infer from

that evidence that the inaction and verbal response of the chief operating officer of the Lake Placid Post Office reflected a practice and policy of condoning sexual harassment.

We note that USPS, in its brief on appeal, faults Fitzgerald for failing to proffer admissible evidence as what Postmaster King may have said to Gerling after Fitzgerald complained of Gerling's conduct. For several reasons Fitzgerald's proffer of no more than her own understanding that King took no action against Gerling could not justify the entry of summary judgment against her. First, from the allegation that "King took no action" (Amended Complaint ¶ 70) it must be inferred that, if King took any action, Fitzgerald was not present. She was in no position to present evidence of events that occurred outside her presence, the district court having rejected her request for discovery. Further, if USPS contends that King in fact took remedial action in response to Fitzgerald's complaints of her supervisor's sexual harassment, that is a matter on which USPS, not Fitzgerald, has the burden of proof. *See* Part II.A.1. above. Finally, on the question of whether there was any remedial response to her complaints, Fitzgerald was not required to come forward with more evidence in opposing summary judgment unless USPS's motion was properly supported as envisioned by Fed. R. Civ.P. 56(e). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *St. Pierre v. Dyer*, 208 F.3d 394, 404 (2d Cir. 2000). She had no such obligation here, for, as noted in Part I.C. above, USPS proffered no relevant statement from Gerling and no affidavit whatever from King.

Not every sexual harassment claim will lend itself to a continuing violation theory, just as not every offensive incident will support a claim of harassment sufficient to alter the working conditions. But Fitzgerald's assertions of escalating harassment every day present an apt basis for application of the continuing violation theory. Thus, as to Phase II, we reject the district court's conclusion that Fitzgerald was not entitled to invoke the continuing violation theory with respect to her claim of hostile work environment.

2. *Inapplicability of the Continuing Violation Theory to Phase I*

We agree, however, with the district court's conclusion that Fitzgerald's claim of sexual harassment in Phase I was not saved by the continuing violation theory. Although Fitzgerald stated that Gerling had subjected her to unwanted sexual overtures daily from the time he arrived in August 1994 until sometime in April 1995, her assertions make it clear that his sexual advances ceased at the end of that period. Though Gerling then proceeded in Phase II to harass Fitzgerald for having rejected his propositions, the Phase II abuse was qualitatively different from his Phase I conduct.

While it may be difficult in some cases to pinpoint the precise time at which the supervisor ceased to make sexual advances and began to punish the employee for rebuffing those advances, Fitzgerald's version of the events presents us with no such difficulty here. None of Fitzgerald's evidence suggests that during the 2 1/2-year period after April 1995 Gerling either made any further sexually suggestive comments to Fitzgerald or offered to abate his abuse and unwarranted criticisms of her work if she would relent and become intimate with him.

Accordingly, the daily abuse during Phase II and the profane and physically intimidating tirade unleashed by Gerling on September 25, 1997, even if motivated by Fitzgerald's rejection of his sexual propositions, cannot reasonably be viewed as a continuation of such propositions. We thus conclude that the Phase I claim could not be deemed timely under the continuing violation theory. Summary judgment dismissing that claim was proper.

In affirming the dismissal of that claim, however, we do not mean to suggest that evidence of Gerling's sexual advances and Fitzgerald's rebuffs in Phase I would not be relevant or admissible to show Gerling's motivation for his constant harassment of Fitzgerald in Phase II. A plaintiff complaining of sexual harassment must show that the treatment of which she complains was motivated by her gender. *See, e.g., Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 63-66, 106 S. Ct. 2399; *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d at 289; *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d at 1042. A statute of limitations does not operate to bar the introduction of evidence that predates the commencement of the limitations period but that is relevant to events during the period. *See, e.g., Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992); *Black Law Enforcement Officers Association v. City of Akron*, 824 F.2d 475, 482-83 (6th Cir. 1987); *see also United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir.) ("The statute of limitations is a defense . . . , not a rule of evidence . . . . [It] has no bearing on the admissibility of evidence."), *cert. denied*, 423 U.S. 829, 96 S. Ct. 48, 46 L.Ed.2d 47 (1975). A suggestion that an item of evidence relates to a period that is too remote goes to both

the item's relevance and its weight. Although we would be skeptical as to the relevance of Fitzgerald's Phase I evidence if there were a significant hiatus between the end of Phase I and the start of Phase II, we have no serious doubts as to its relevance where there is evidence of a swift transition from entreaty to retribution. Any question as to the weight to be accorded the Phase I evidence in connection with the Phase II claims is, of course, a matter for the jury. *See, e.g., Smith v. Lightning Bolt Productions*, 861 F.2d 363, 367 (2d Cir. 1988).

3. *The Merits of the Hostile Work Environment Claim*

We also disagree with the district court's summary dismissal of the claim of hostile work environment based on its view that Fitzgerald could not show any adverse employment action. The court reached that conclusion in part because it found the continuing violation theory inapplicable, and in part because it found the September 25, 1997 incident "'in and of itself' insufficiently severe" to constitute a materially adverse change in Fitzgerald's working conditions, 36 F. Supp.2d at 503. We have rejected the former premise in Part II.D.1. above. We reject the latter ground because the court viewed the record in piecemeal fashion, failed to draw all permissible inferences in Fitzgerald's favor, and resolved questions of fact that are reserved for decision by a jury.

First, it was inappropriate for the court to focus solely on the September 25, 1997 incident. Fitzgerald asserted that Gerling unfairly, harshly, and disparately abused her daily. Thus, as even HRD acknowledged, "*more than one* of the acts fell within the regulatory 45-

day limitation period. . . ." (HRD Letter at 2 (emphasis added)).

More importantly, because the continuing violation theory is applicable to Fitzgerald's allegations of hostile work environment in Phase II, a factfinder may consider her evidence that Gerling subjected her to unfair harassment every day during that 2 1/2-year period, as well as her assertion that his harassment during that period escalated. HRD appeared to give weight to the fact that Fitzgerald did not lodge a formal complaint with HRD during the lengthy period of claimed constant abuse. Although Fitzgerald's failure to seek administrative assistance during that period is a fact that plainly may be considered in weighing her testimony that she was subjected to harassment that was so constant and so abusive as to materially affect her working conditions, the weighing of the evidence and the decision as to which of competing inferences is to be drawn is solely within the province of the factfinder. The jury will be entitled to find that as Gerling's abuse intensified, it became increasingly difficult for Fitzgerald to perform her job.

In sum, there are questions of fact to be determined in order to resolve Fitzgerald's claim of hostile work environment.

4. *The Retaliation Claim*

The scope of the district court's rejection of Fitzgerald's claim of retaliation also warrants further discussion. The district court dismissed this claim, ruling (1) that Fitzgerald did not allege in her EEO Complaint that Gerling retaliated against her for threatening to file an administrative complaint, and (2) that a valid retaliation claim must allege that the employee suffered

adverse employment consequences because she lodged or threatened to lodge a complaint about her supervisor, and is insufficient if it alleges "only" that she suffered such consequences because she resisted her supervisor's sexual advances. 36 F. Supp.2d at 498-99. We agree with the first ruling, and need not reach the second.

To the extent that the district court rejected so much of the retaliation claim as was based on an assertion that Gerling abused Fitzgerald because she threatened to file an administrative complaint, we agree that such a claim may not properly be pursued in this action. There was no semblance of that claim in Fitzgerald's EEO Complaint. That part of her claim of retaliation was properly dismissed for lack of exhaustion. However, we need not rule on the district court's view that "rejection of sexual advances is not a protected activity under Title VII," 36 F. Supp.2d at 499, because in this case, Fitzgerald's retaliation claim is coextensive with her claim of Phase II hostile work environment, and would not warrant an award distinct from or in addition to any award she might win on that claim.

Further, the current state of the record suggests that Fitzgerald's claim of disparate treatment (if any) too should be viewed as identical to her claim of hostile work environment. Fitzgerald asserts that two female employees who yielded to Gerling's sexual advances received preferred treatment in that they, though junior to Fitzgerald, were given weekends off, while Fitzgerald was forced to work in their stead. Assuming that this allegation describes a provable disparity, Fitzgerald nonetheless has cited only to isolated incidents and has made no effort on this appeal to suggest that such incidents were sufficiently numerous or recurrent

to make any such claim timely under the continuing violation theory. Thus, to the extent that Fitzgerald intended her assertions that Gerling's sexual partners received preferential treatment to state a claim of disparate treatment that differed from her claim of hostile work environment, the disparate treatment claim was properly dismissed as time barred.

5. *The Constructive Discharge Claim*

Finally, we have difficulty with the district court's summary dismissal of Fitzgerald's claim that she was constructively discharged. Preliminarily, we note that although the specific phrase "constructive discharge" was not used in the amended complaint, the pleading asserted that Gerling continually harassed Fitzgerald, that he did so deliberately and in bad faith as retribution for her refusal of his sexual advances, and that his abuse so persisted and escalated that it essentially brought on a psychological breakdown, causing her to became unable to work at all. Such allegations are ample to encompass a theory of constructive discharge. Indeed, the district court did not purport to dismiss this claim on the theory that it was not within the scope of the complaint.

Rather, in dismissing the constructive discharge claim, the court ruled principally that the September 25, 1997 incident in and of itself could not be viewed as a constructive discharge because it did not differ from the treatment that Fitzgerald had received in the past and would not have compelled a reasonable person to resign. That ruling was based in part on the court's view of the continuing violation theory, which we have rejected, and in part on a view of the record that does not draw permissible inferences in Fitzgerald's favor. A jury would be entitled to take into account not just

Gerling's conduct on September 25, 1997, but as well his conduct throughout Phase II. And, crediting Fitzgerald's evidence that Gerling abused her every day for 2 1/2 years, the jury could permissibly find that as a result of the cumulative effect of his constant abuse and unfair criticism—especially if its severity was escalating, as Fitzgerald asserted—a reasonable person on September 25, 1997, would have found the working conditions intolerable. The questions of whether to credit Fitzgerald's evidence and how, objectively, to assess the endurability of her working conditions were questions of fact to be answered by the jury, not matters of law for the court on summary judgment.

CONCLUSION

We have considered all of USPS's arguments in support of the judgment and, except to the extent indicated above, have found them to be without merit. The judgment is affirmed to the extent that it dismissed Fitzgerald's claims of (a) sexual harassment prior to April 1995, (b) preferential conferral of benefits on other employees who were sexually submissive, and (c) retaliation for her threat to file an EEO complaint. In all other respects, the judgment is vacated, and the matter is remanded for further proceedings not inconsistent with this opinion.

We note that prior to oral argument of this appeal, Fitzgerald moved in this Court to expand the record in order to introduce, *inter alia*, supporting affidavits of her coworkers, that she submitted in workers' compensation proceedings. We have not considered any of those materials on this appeal because they were not presented to the district court; indeed, many were not even in existence before the judgment in this action was entered. Our denial of the motion to supplement

the record on appeal, however, does not bar Fitzgerald from proffering such evidence, in appropriate form, in the proceedings on remand.

KORMAN, District Judge, dissenting in part

The record in this case is summarized extensively in the majority opinion. The case involves a complaint alleging *quid pro quo* sexual harassment engaged in by Timonthy Gerling, the supervisor of Lisa Fitzgerald at the Lake Placid Post Office. This conduct ended shortly after Fitzgerald complained to the Postmaster. Nevertheless, she alleges that it was followed almost immediately by two and one-half years of a hostile work environment created by Gerling and directed at Fitzgerald solely because she refused his advances.

The principal issue on this appeal is whether these claims are time-barred under regulations formulated initially by the Civil Service Commission and later by the Equal Employment Opportunity Commission ("EEOC") pursuant to 42 U.S.C. § 2000e-16(b). Specifically, when Congress extended the coverage of Title VII to federal employees in 1972, it conferred on the Civil Service Commission the power to enforce the mandate that all personnel actions affecting federal employees, including those of the Postal Service, should "be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). The administrative enforcement powers included the issuance of "such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 42 U.S.C. § 2000e-16(b).

The administrative regulations set out a carefully considered scheme to encourage employees to file dis-

crimination complaints before positions on both sides have hardened. They provide that a person who believes that he or she has been discriminated against for impermissible reasons, including sex, must first seek counseling from the alleged discriminating agency before even filing a formal complaint with the agency. 29 C.F.R. § 1614.105(a). This informal counseling must be sought with an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The failure to comply with this rule precludes the filing of a formal complaint with the agency, 29 C.F.R. § 1614.107(a)(2), and precludes a discrimination claim in federal court. *Briones v. Runyon*, 101 F.3d 287, 289-90 (2d Cir. 1996).

When it was originally promulgated by the Civil Service Commission, the period within which EEO counseling had to be sought was 30 days. In 1992, the EEOC, to which the rule-making power was later delegated, explained why it had rejected suggestions that it adopt the 180-day period applicable to private sector administrative complaints:

> We do not believe that the analogy between the private sector filing period and the federal sector counseling time limit is apt. Private employees must actually file a complaint within 180 days, not just contact an EEOC office about doing so. Private employees may have to travel many miles or use the mail to file a charge with EEOC while federal employees only have to contact a counselor by telephone or often merely visit a counselor who is located in the same work place in order to comply with the time limit. Moreover, a comparison of

> private sector charge filings and federal sector complaint filings indicates that federal employees file complaints at a rate three time greater than private sector employees file charges. Further, the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened. Therefore, we believe a significant lengthening of the pre-complaint period is not justified.

57 Fed. Reg. 12634, 12634-35 (April 10, 1992) (hereinafter "EEOC Explanation of Final Rule").

Nevertheless, the EEOC expanded the time limits for seeking counseling from 30 to 45 days. In so doing, it observed that "Part 1614 . . . also requires an agency to extend the time limit for contacting a counselor where warranted by the circumstances." *Id.* at 12635. The circumstances are extremely generous and are "uncommon to statutes of limitations." *Pauling v. Secretary of Dep't of Interior*, 160 F.3d 133, 136 (2d Cir. 1998). They expressly provide for extending the 45 day period (1) if the aggrieved employee was not notified of the time limits and was not otherwise aware of them, (2) if the aggrieved employee did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, (3) if the aggrieved employee was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or (4) "for other reasons considered sufficient by the agency or the Commission." 29 C.F.R. § 1614.105(a)(2). The second ground for extending the 45 day period, which is implicated here, was also added in 1992.

Plaintiff in this case did not timely seek EEO counseling for a significant part of the time period that

she endured *quid pro quo* the sexual harassment and the hostile environment alleged in the complaint. Nonetheless, the Postal Service considered whether an extension was justified under the "[Equal Employment Opportunity] Commission continuing violation theory." This theory covers conduct occurring over a period of time under circumstances in which the discriminatory animus of an employer may not be apparent until some time has passed. Conduct occurring before an employee could reasonably have understood its underlying motivation is not time-barred, even if it took place more than 45 days before EEO counseling was sought. This theory could not avail plaintiff here because the record was clear that she was aware of the reason Gerling was mistreating her. Hence, the Postal Service declined to extend the 45-day period to acts occurring prior to the commencement of that time period. It did, however, consider and reject on the merits the claim that the conduct alleged within the 45-day period constituted a hostile work environment.

The district court here accepted the position of the Postal Service and granted summary judgment. The majority affirms the judgment in part and reverses it in part. I concur in this disposition except to the extent that it holds that plaintiff is entitled to recover for acts that constituted a hostile work environment and that took place more than 45 days prior to the time plaintiff sought EEO counseling. I am unable to join in that part of the holding, because it effectively nullifies the 45-day rule and the administrative scheme of which it is a part, and because the rule adopted by the majority is unsound and inconsistent with the prevailing Title VII law.

I begin first with the 45-day period of limitations and the reasons the EEO gave for declining to invoke the broad discretion it had to toll it. The 45-day period of limitations is prescribed in what is known as a legislative rule. Such rules are adopted pursuant to express authorization by Congress and they "create new law, rights, or duties, in what amounts to a legislative act." *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993); *see also Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000). We have held that, "[w]hen Congress delegates to an agency the power to promulgate rules, the [agency] adopts rules with legislative effect. . . . The [rule] is therefore entitled to more than mere deference or weight. It can be set aside only if the [agency] exceeded [its] statutory authority or if the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *United States v. Chestman*, 947 F.2d 551, 557-58 (2d Cir. 1991) (en banc) (internal quotations and citations omitted).

The legislative rule at issue here—the 45-day period of limitation—is eminently reasonable. Like most periods of limitations, it reflects a number of significant considerations of policy beyond protection against stale claims. *See generally* Robert A. Leflar, *The New Conflicts-Limitation Act*, 35 Mercer L.Rev. 461, 469 (1984). One of those considerations is that "the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened." *See* EEOC Explanation of Final Rule, 57 Fed. Reg. at 12635. This avenue of relief may also have the effect of limiting potential liability for hostile conduct, because such conduct could be stopped if an aggrieved employee seeks timely EEO intervention and avails herself of the follow-up procedures prescribed in

the regulations. Indeed, only recently the Supreme Court predicated an affirmative defense on the premise that, "[i]f the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998); *see also Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295-96 (2d Cir. 1999). If an aggrieved employee may have an obligation "to avail herself of the employer's preventive or remedial apparatus," *id.* at 807, 118 S. Ct. 2275, surely a regulation that requires her to do so in a timely fashion is an entirely reasonable exercise of the legislative rulemaking power conferred on the EEOC.

Plaintiff here does not challenge the validity of the EEOC regulation. Nor is the application of that regulation here unreasonable. The Postal Service (Human Resources Office) declined to extend the 45-day period because, "the record indicates that [Fitzgerald] had prior knowledge or suspicion of discrimination before [Fitzgerald] sought EEO counseling in that [Fitzgerald's] attorney representative's correspondence states 'postal service management has been made repeatedly aware of this situation.'" Appellant's Supp. Appendix at 18. The Postal Service also found that "a reasonable person in [Fitzgerald's] position would have suspected discrimination months, even years before [Fitzgerald] initiated EEO counseling on October 24, 1997." *Id.* Significantly, following one of the acts of retaliatory harassment that contributed to a hostile work environment and that occurred as early as April 25, 1995, Fitzgerald "threatened to file an administrative complaint against Gerling for sexual harassment."

Supra at 351. Thus, the Postal Service reasonably held that Fitzgerald could not avail herself of the specific tolling provision in the EEOC regulation based on her unawareness of the discriminatory actions. 29 C.F.R. § 1614.105(a)(2).

We need go no further than determine that the Postal Service concluded reasonably that the plaintiff's filing was in large part time-barred. *See Lopez v. Louisiana Nat'l Guard*, 733 F. Supp. 1059, 1071-72 (E.D.La.1990). *Chandler v. Roudebush*, 425 U.S. 840, 96 S. Ct. 1949, 48 L.Ed.2d 416 (1976), which holds that Congress did not intend that an adverse EEOC determination would preclude federal employees from litigating anew the substantive merits of their Title VII claims, does not require a contrary result. This case involves the application of a procedural rule that the EEOC was authorized to adopt. It does not involve the substantive merits of the complaint. Nonetheless, even under a standard of *de novo* review, the decision of the Postal Service is clearly correct. Indeed, the approach to equitable tolling applied by the Postal Service is consistent with that followed by a number of the Circuits, and is more liberal than the prevailing Second Circuit law.

Chief Judge Posner's opinion in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) is particularly instructive. There at issue was the period of limitations for filing a Title VII sexual harassment charge with the EEOC. Judge Posner began by observing "that standard principles of limitations law, notably the discovery doctrine and the doctrines of equitable estoppel and equitable tolling, excuse the claimant from having to file before it is feasible for him to do so, and . . . apply to cases brought under Title

VII." *Id.* at 1166 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L.Ed.2d 234 (1982)).

These "meliorative doctrines," he continued, apply equally to sexual harassment cases. *Id.* "Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event." *Id.* The significance of this process to the doctrine of equitable tolling is that, "[i]n its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable, or may not cause sufficient distress to be worth making a federal case out of, or may not have gone on long enough to charge the employer with knowledge and a negligent failure to take effective remedial measures." *Id.* (citations omitted). Because we "do not want to encourage premature or precipitate litigation," conduct that is not made the subject of an immediate complaint is not time-barred provided "the victim of sexual harassment sues as soon as harassment becomes sufficiently palpable that a reasonable person would realize she had a substantial claim under Title VII." *Id.* If she does so "then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." *Id.*

Judge Posner addressed specifically circumstances comparable to the present case, "when a long-continued series of harassing acts definitely *are* a series, a pattern, and not merely a set of discrete events, yet it was evident long before the plaintiff finally sued that she was the victim of actionable harassment." *Id.* at 1167. In such a case, Judge Posner concluded,

> while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute of limitations; for she had no excuse for waiting that long. An additional consideration is that the bringing of the suit is almost certain to stop the harassment, so that unlike certain cases of nuisance the plaintiff will not be put to the expense of bringing successive suits. What is more, she can seek injunctive relief against a continuation of the unlawful conduct.

Id. (citations omitted). The principle to be extracted from the preceding discussion, which "organizes the complex and diffuse case law on continuing violations under Title VII[,] is that the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct. . . ." *Id.*

The First Circuit applied a similar analysis in *Sabree v. United Brotherhood of Carpenters and Joiners Local 33*, 921 F.2d 396 (1st Cir. 1990). A panel that included then-Chief Judge Breyer held that the critical inquiry in determining whether a continuing violation tolled the period of limitations is "what the plaintiff knew or should have known at the time of the discriminatory act." *Id.* at 402. Specifically, *Sabree* held:

> What matters is whether, when and to what extent the plaintiff was on inquiry notice. A claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to

> bar by the [300] day limitation period. It is this factor that is the undoing of Sabree, for he has admitted that he believed, at every turn, that he was being discriminated against. A knowing plaintiff has an obligation to file promptly or lose his claim. This can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern. After all, [e]mployers as well as employees are entitled to procedural safeguards in the precincts patrolled by Title VII.

Id. (internal quotations and citations omitted). By contrast, *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476 (3d Cir.1997), applying the *Galloway* holding, held that plaintiff's "failure to claim harassment in the 1991 EEOC charge does not destroy her claim, because the evidence shows that the harassment intensified after the charge was filed, and, moreover, she did not realize early on how pervasive or severe the harassment was." *Id.* at 483; *see also Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir.1998) (tolling of statute of limitations was justified where "pattern of harassment was not the kind of violation that . . . would put a worker on notice that his rights had been violated").

The reasoning in *Galloway* and *Sabree* has also been applied in a number of other cases and appears to reflect the prevailing view in six of the Circuits. In addition to the cases cited above, *see Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1311 (10th Cir. 1999); *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344 (7th Cir.1999); *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14-15 (1st Cir. 1998); *Conlin v. Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989); *Roberts v. Gadsden*

Mem'l Hosp., 850 F.2d 1549, 1550 (11th Cir. 1988); *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983); *contra Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1014-15 (9th Cir. 2000), *petition for cert. filed* (U.S. Apr. 23, 2001) (No. 00-1614). Of particular note in our own Circuit is Judge Kaplan's characteristically scholarly opinion in *Johnson v. Nyack Hosp.*, 891 F. Supp. 155 (S.D.N.Y. 1995), *aff'd on other grounds*, 86 F.3d 8 (2d Cir. 1996). There he held that the statute of limitations for filing a complaint in the district court would be tolled where (1) "the discriminatory acts within and without the limitation period are sufficiently similar and frequent to justify a conclusion that both are part of a single discriminatory practice chargeable to the employer," *id.* at 165, and (2) "the circumstances are such that a reasonable person in the plaintiff's position would not have sued earlier." *Id.* This test, Judge Kaplan continued, "gives due regard both to the defendant's interest in being protected against stale claims and to the plaintiff's interest in adopting strategies designed to deal both with employment discrimination and of being certain that matters have reached a point affording a proper basis for resort to the courts." *Id.* Nevertheless, Judge Kaplan held that the plaintiff's claims were time-barred because the plaintiff "was well aware of the basis for the charges of racial discrimination included in the amended complaint," *id.*, and had not advanced any reason "as to why the civil rights claims were not asserted in federal court until more than seven years after the privileges were revoked, and the Court can conceive of none." *Id.* at 166.

We have never had any occasion to consider, much less reject the prevailing authority discussed above,

although the majority rejects it today without discussion. The Second Circuit case law is hardly the seamless web that the majority suggests compels the result here. *Supra* at [27a-30a, 32a-36a]. On the contrary, on careful examination, it seems clear that the result reached by the majority is inconsistent with the Second Circuit approach to the doctrine of equitable tolling and to holdings in cases specifically applying the doctrine in a Title VII context.

While we have acknowledged that "[e]quitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances," *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996), we have held repeatedly that "[e]quitable tolling requires a party to pass with reasonable diligence through the period it seeks to have tolled." *Id.*; *see also Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (same); *Dodds v. Cigna Secs., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993) (equitable tolling will stay running of statutory period "only so long as the plaintiff has exercised reasonable care and diligence" (internal quotations omitted)), *cert. denied*, 511 U.S. 1019, 114 S. Ct. 1401, 128 L.Ed.2d 74 (1994); *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 264 (2d Cir. 1990) (equitable tolling not satisfied in the absence of "affirmative action on the part of [plaintiff] to preserve its right"); *accord Singletary v. Continental Illinois Nat'l Bank & Trust Co.*, 9 F.3d 1236, 1241 (7th Cir. 1993) (equitable tolling "permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before").

The present case does not present "extraordinary or exceptional circumstances warranting equitable toll-

ing." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). The relevant factual allegations are set forth as follows in the majority opinion:

> Fitzgerald stated that "[a]fter the incidents of [retaliatory harassment in] April and May[ ] 1995, and continuing through 1996 and 1997, Gerling became increasingly hostile and abusive toward plaintiff." (Amended Complaint ¶ 90.) She stated that he unjustifiably berated her about her hours and productivity; he attempted to force her to work overtime when she was not scheduled to work, and he criticized her when she worked scheduled overtime; he treated her more harshly than male employees and than two female employees with whom he had had or was having a sexual relationship. Fitzgerald alleged that the harassment was "ongoing," "repeated," and "continuing" (EEO Complaint ¶¶ 10, 12, 20), occurring "day to day" (Amended Complaint ¶ 92), as Gerling "regularly and unfairly criticized" her work (*id.* ¶ 93) "repeatedly and on a continuing basis" (*id.* ¶ 91); she alleged that "[t]hese acts of hostility, criticism and harassment were severe and persistent and occurred on a continuing basis from April 1995 through September 1997" (*id.* ¶ 121). Thus, although the final abusive incident on September 25, 1997, was separated from Gerling's final sexual advances by a gap of nearly 2 1/2 years, Fitzgerald's assertions plainly alleged that there was no interruption in the allegedly unwarranted abuse to which she was subjected during that 2 1/2-year Phase II period.

Supra at [30a-32a]. Even under the most generous equitable tolling standard, Fitzgerald's claim fails because, as the Postal Service found and Fitzgerald does

not counter with any persuasive argument, the retaliatory harassment had proceeded well past the time during which a reasonable person would have sought EEO counseling.

In reaching a contrary conclusion here, the majority does not refer to the doctrine of equitable tolling or the considerations of policy that provide the basis for tolling the period of limitations, even though the 45-day rule is "analogous to a statute of limitations and is . . . considered subject to waiver, estoppel, and equitable tolling." *See Briones v. Runyon*, 101 F.3d 287, 290 (2d Cir. 1996). Instead, the majority holds that, because the hostile environment was permitted by the employer "to continue unremedied for so long that its inaction may reasonably be viewed as tantamount to a policy or practice of tolerating such discrimination," the 45-day period of limitations must be tolled. Supra at [28a-30a]. The only support for this holding is one sentence of dictum taken out of context from *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994), that was not accompanied by the citation of a single case or by any explanation. Supra at [22a-24a]. The dictum has since been repeated in two subsequent cases. *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996). Nevertheless, as is shown below, it is contrary to Second Circuit law.

In *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), it was held that, "if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Id.* at 53. A "challenge to

systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future." *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761 (9th Cir. 1980) (citation omitted). Consistent with the policy underlying the rule, *Lambert* emphasized, however, that "[t]he continuing violation exception applies to cases involving specific discriminatory policies or mechanisms such as discriminatory seniority lists or discriminatory employment tests. . . . *[M]ultiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation. Since [the Lambert] plaintiffs failed to produce evidence of any such policy or mechanism here, the charge-person claims were properly dismissed as time-barred.*" *Lambert*, 10 F.3d at 53 (citations omitted) (emphasis added).

In *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994), it was suggested that a continuing violation may also be shown "where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.* at 704. While the majority relies on this dictum, it ignores the context of the case and the manner in which it was limited subsequently. *Cornwell* was a hybrid case; it involved a combination of "personnel policies [that] discriminated on the basis of gender and . . . race- and gender-based harassment that [the defendant] and its supervisory personnel permitted to continue." *Id.* Judge Kearse, writing in *Cornwell*, continued, "[a]gainst the background of [the defendant's] gender-discriminatory policies *and* the

hostile work environment created by those male [employees] who sought to rid MacCormick [a facility operated by the defendant] of female [employees], the [district] court properly concluded that the acts of discrimination and harassment by the individual defendants constituted a continuing wrong. . . ." *Id.* (emphasis added).

Subsequently, in an opinion joined by Judge Kearse, *Connecticut Light & Power Co. v. Secretary of Dep't of Labor*, 85 F.3d 89 (2d Cir. 1996), *Cornwell* was read as holding that a "continuing violation exists where there is a relationship between a series of discriminatory actions and an invalid, underlying policy." *Id.* at 96. The prevailing law was summarized as follows: "[t]hus, in cases where the plaintiff proves i) an underlying discriminatory policy or practice, and ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint, the continuing violation rule shelters claims for all other actions taken pursuant to the same policy from the limitations period." *Id.* Both of these conditions were met in that case.

The common thread that runs through the Second Circuit *holdings* from *Lambert* to *Connecticut Light & Power Co.*, is the requirement of an actual underlying policy as a predicate for applying the continuing violation rule. This thread was not severed in *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998) and *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996), which were decided after *Connecticut Light & Power Co.*, and which repeat without qualification the *Cornwell* dictum that the continuing violation exception can apply where "specific and related instances of discrimination are permitted by the em-

ployer to continue unremedied for so long as to amount to a discriminatory policy." *Quinn*, 159 F.3d at 766; *Van Zant*, 80 F.3d at 713. Both of these cases refused to toll the period of limitations, and I am not aware of any Second Circuit case that has applied this dictum to toll the statute of limitations in the absence of an underlying policy. We have recently rejected the notion that mere repetition can convert dictum to binding precedent, and we declined to follow an oft-repeated dictum that had never been the basis for a holding. *Francis v. City of New York*, 235 F.3d 763, 767-68 & n. 2 (2d Cir. 2000). We should take the same approach with respect to the *Cornwell* dictum.

In any event, there is no basis for the suggestion that—in the words of the *Cornwell* dictum—the Postal Service permitted "specific and related instances of discrimination . . . to continue unremedied for so long as to amount to a discriminatory policy or practice." *Cornwell*, 23 F.3d at 704. While it is true that the Postmaster of the Lake Placid Post Office may have ignored plaintiff's complaints, there was in place a mechanism to deal with precisely this kind of supervisory neglect, namely, an EEO counselor and other follow-up procedures prescribed in the regulations. Plaintiff did not avail herself of that remedy for almost two and one-half years. She offers no justification for the failure to do so. Thus, even if the Postal Service may be vicariously liable for the hostile and discriminatory conduct of its employee, it is a considerable stretch to attribute plaintiff's ordeal to a policy or practice of the Postal Service to permit the discrimination she suffered to go unremedied. Nor does plaintiff allege the existence of such a policy. Instead, the very same conduct that constitutes the elements of the cause of action against the

Postal Service for harassment and retaliation (offensive conduct by one supervisory employee and the failure of another supervisory employee to stop it) is also said to constitute the alleged discriminatory practice or policy. I do not understand why this justifies invoking the doctrine of equitable tolling. Indeed, the application of *Cornwell* here means that, for all practical purposes, the period of limitations would be tolled in every case involving sexual harassment or hostile work environment. Perhaps this should be the law. Nevertheless, I am not persuaded that it is consistent with the considerations underlying the doctrine of equitable tolling. Nor am I persuaded that we should override the reasonable administrative scheme that the EEOC adopted here. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 98-CV-1005

LISA L. FITZGERALD, PLAINTIFF

v.

WILLIAM HENDERSON, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, DEFENDANT

Dec. 29, 1998

Order Denying Reconsideration
March 12, 1999

MEMORANDUM-DECISION & ORDER

McAVOY, Chief Judge.

Plaintiff Lisa Fitzgerald ("Fitzgerald" or "Plaintiff") brought the instant action on June 25, 1998, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, against William Henderson, Postmaster General of the United States Post Office ("Defendant") alleging, inter alia, sexual discrimination and harassment, and unlawful retaliation. Specifically, Plaintiff asserts that she was subjected to unlawful sexual discrimination and harassment by her direct supervisor, Timothy Gerling ("Gerling"), which allegedly continued despite Plaintiffs numerous requests for inter-

vention to Dennis King ("King"), Postmaster of the Lake Placid Post Office, where Plaintiff was employed as a letter carrier. Plaintiff seeks declaratory relief and monetary damages, and cross-moves for leave to amend her Amended Complaint.

Defendant now moves for partial dismissal pursuant to Fed. R. Civ. P. 12(b)(1), (6), or in the alternative, for partial summary judgment pursuant to Fed. R. Civ. P. 56 and to strike Plaintiff's claim for punitive damages from the Amended Complaint.[1] Defendant also opposes Plaintiff's cross-motion for leave to amend her Amended Complaint.

I. Background

Plaintiff filed her Complaint on June 25, 1998. After receiving a final decision from the United States Postal Service ("Postal Service"), rejecting and dismissing the remainder of Plaintiffs sexual discrimination and harassment claims, Plaintiff filed an Amended Complaint on August 19, 1998. The Amended Complaint contains claims under 42 U.S.C. § 2000e *et seq.*, stating various claims sounding in sexual discrimination and

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[1] Defendant initially moved to strike those portions of Plaintiff's Amended Complaint that deal with (1) allegations detailing events that occurred prior to August 6, 1994, the date Gerling allegedly began his service at the Lake Placid Post Office; (2) a claim for frontpay; and (3) a claim for punitive damages. *See* Def. Mem. of Law at 6-7, 18-20. In his reply papers, however, Defendant withdrew his motion to strike those portions of the Amended Complaint dealing with events occurring prior to August 6, 1994, and Plaintiff's frontpay claim. *See* Def. Reply at 1-2. Thus, Defendant seeks to strike only that portion of the Amended Complaint that moves for punitive damages.

harassment.[2] Specifically, Plaintiff alleges claims of disparate treatment based on gender, hostile work environment, and retaliation. *See* Amended Compl. at ¶¶ 119-24. Plaintiff also asserts a claim of constructive discharge related to her being on medical leave since September 25, 1997. *See id.* at ¶ 127. These claims all arise out of the same factual setting.

Plaintiff, a female, was an employee of the Postal Service since 1986 in the position of Grade 5 City Letter Carrier. On or about 1994, Gerling was hired as a supervisor in the Lake Placid Post Office, where he functioned as Plaintiff's direct supervisor.[3] During this time, King was the Postmaster of the Lake Placid Post Office. Soon after Gerling started, Plaintiff alleges in her Amended Complaint, as paraphrased in Plaintiff's Memorandum of Law, that Gerling subjected her to a "series of unwelcome sexual advances" that included:

> [S]tanding in close proximity to [Plaintiff], while softly laying his hand on her shoulder; shaking hands with her on a daily basis, and softly holding her hand for an unusually long period of time; entering her work cubical [sic], standing in close proximity to her, and effectively blocking her only means of egress; staring at her inappropriately while she was working at her sorting station or loading her mail truck; embracing her at the work-

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[2] Plaintiff's Amended Complaint, which states only one cause of action, asserts claims of retaliation and sexual discrimination and sexual harassment. *See* Amended Compl. at ¶¶ 119-27.

[3] Gerling's commencement date at the Lake Placid Post Office is a source of contention between the parties. While defendant asserts that Gerling began his employment in late 1994, see Def. Mem. of Law at 3, Plaintiff asserts that Gerling became her supervisor in late 1993 or early 1994. *See* Amended Compl. at 11.

> site; telling her that she looked nice in shorts; directing her to see him in his office, and then attempting to engage her in non-work related conversations; staring inappropriately at her body and asking her how much she weighed; telling her that he liked her long hair; inviting her to lunch; boasting to her that he will 'father [her] first child'; asking her to meet him after work; running his hand through her hair; offering to teach her 'relaxation techniques'; and inviting her to go dancing with him.

Pl. Mem. of Law at 3-4 (paraphrasing allegations set forth in Plaintiff's Amended Compl. at ¶¶ 14-32, 38, 42, 51-52).

Around October 1994, Plaintiff agreed to meet with Gerling after work to "tell Gerling that she was not interested in engaging in a sexual relationship with him." Amended Compl. at ¶ 46. Her efforts allegedly proved unsuccessful, and from late 1994 into early 1995, Gerling made similar unwelcome advances toward Plaintiff, prompting her to seek the intervention of Postmaster King. These efforts, too, proved unsuccessful. Amended Compl. at ¶¶ 44-70.

In early April 1995, Plaintiff was issued a "letter of warning" by Gerling for declining to work overtime on a weekend in which she was not scheduled to work. The letter of warning represented a formal disciplinary action by the Postal Service. In response, Plaintiff filed a grievance under the collective bargaining agreement to contest the letter of warning. Gerling subsequently retracted the letter in return for Plaintiff's attendance at an "employee assistance program," where she met with a counselor to discuss issues relating to her employment. Plaintiff further asserts that Gerling agreed to withdraw his letter of warning after she threatened

to file an EEO complaint alleging sexual harassment against him. Thereafter, Gerling allegedly continued to harass Plaintiff, subjecting her to harsher and more critical treatment than her co-workers.

On September 25, the situation culminated after Gerling allegedly yelled at Plaintiff in a profane manner and pointed his finger at her. Confronted by Gerling's growing hostility and harassment, Plaintiff alleges that she sought medical attention because she was unable to complete her duties. Since this incident, Plaintiff has been on medical leave, "totally disabled from working" and suffering from a number of "psychological and medical conditions . . . directly arising from the trauma and harassment she suffered at the hands of supervisor Gerling." Amended Compl. at ¶¶ 110-13. Plaintiff contacted an EEO Postal Service Counselor on October 24, 1997, and filed her "EEO Complaint of Discrimination in the Postal Service Form" ("EEO Complaint") on January 30, 1998.

II. Discussion

A. The Standard for Summary Judgment

The standard for summary judgment is well-settled. Under Fed. R. Civ. P. 56(c), if there is "no genuine issue as to any material fact . . . the moving party is entitled to a judgment as a matter of law . . . where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *see also Chertkova* v. *Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 86 (1996). The moving party bears the initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, deposi-

tions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). The initial burden is to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S. Ct. 2548.

Once the moving party has met its burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 322, 106 S. Ct. 2548; *Matsushita*, 475 U.S. at 585-86, 106 S. Ct. 1348. A dispute regarding a material fact is genuine if a reasonable jury could return a verdict for the non-moving party; that is, whether the non-movant's case, if proved at trial, would be sufficient to survive a motion for judgment as a matter of law. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). When reasonable minds, however, could not differ as to the import of the evidence, then summary judgment is proper. *Bryant* v. *Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L.Ed.2d 117 (1991).

Although the trial court must resolve all ambiguities and draw all inferences in favor of that party against whom summary judgment is sought, *Ramseur* v. *Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989); *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 249 (2d Cir. 1985) *cert. denied*, 484 U.S. 918, 108 S. Ct. 269, 98 L.Ed.2d 226 (1987), the motion will not be defeated by a non-movant who raises merely a "metaphysical doubt" concerning the facts or who only offers conjecture or surmise. *Delaware & H.R. Co.* v.

Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990), *cert. denied*, 500 U.S. 928, 111 S. Ct. 2041, 114 L.Ed.2d 125 (1991) (quoting *Matsushita*, 475 U.S. at 586, 106 S. Ct. 1348); *see also Western World Ins. Co.* v. *Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990). Indeed, the nonmoving party's opposition may not rest on mere allegations or denials of the moving party's pleading, but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The Court is aware of the dangers of summary judgment in connection with a Title VII claim. "Because direct evidence of . . . discriminatory intent will rarely be found, 'affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Schwapp* v. *Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (quoting *Gallo* v. *Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1224 (2d Cir. 1994)). "However, even in the discrimination context, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." *Id.* (citing *Meiri* v. *Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), *cert. denied* 474 U.S. 829, 106 S. Ct. 91, 88 L.Ed.2d 74 (1985)).

It is with these standards in mind that the Court addresses the issues presented.

B. Whether Summary Judgment is Appropriate

As a threshold matter, Plaintiff contends that Defendant's motion for summary judgment is premature because the parties have yet to conduct any discovery. *See* Pl. Mem. of Law at 10. In that regard, Plaintiff asserts that "[d]ismissing plaintiff's claims without discovery and prior to an answer from defendant would offend the long favored liberal pleading and open and

fair discovery policy of the Federal Rules of Civil Procedure." Casagrande Aff. at ¶ 26; Pl. Mem. of Law at 10. However, Plaintiff neither cites to any specific provision in the Federal Rules of Civil Procedure to support this broad assertion nor indicates what facts are sought that would create a genuine issue of material fact sufficient to preclude summary judgment.

Defendant submits, in support of his motion for partial summary judgment,[4] inter alia, the declaration of his attorney, Anne Gallaudet; and declarations from Gerling and Linda Greaney, an Appeals Review Examiner for the Postal Service. Defendant also attached Plaintiff's EEO Complaint; "Information for Precomplaint Counseling Form" ("Counseling Form"); and an "EEO Investigative Affidavit" ("Investigative Affidavit")[5] completed by Plaintiff. While those documents are referred to in Plaintiff's federal Complaint, they are not annexed as exhibits thereto.

In opposition, Plaintiff submits only a Memorandum of Law, an attorney's affidavit, and a statement of undisputed material facts.[6] Plaintiff, by contrast, has not even submitted an affidavit stating her version of the facts giving rise to the lawsuit.

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[4] Although Defendant's motion moves for "partial" summary judgment, the Court notes that Defendant's moving papers address all claims raised by Plaintiff.

[5] The EEO Investigative Affidavit was prepared on June 27, 1998, almost five months subsequent to Plaintiff filing of her EEO Complaint.

[6] Notably, Plaintiff titled her opposition papers as "Memorandum of Law in Opposition to Defendant's Motion to Dismiss/ Summary Judgment." Consequently, Plaintiff was on notice that Defendant's motion would be treated as a motion for summary judgment.

"Rule 56(f) states that when it appears that the party opposing a motion for summary judgment cannot 'present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit . . . discovery to be had.' Thus, a party seeking such discovery must file an affidavit explaining (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Hudson River Sloop Clearwater, Inc.* v. *Dept. of the Navy*, 891 F.2d 414, 422 (2d Cir. 1989) ("*Hudson*") (citing *Burlington Coat Factory Warehouse Corp.* v. *Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985)); *Szarka* v. *Reynolds Metals Co.*, 17 F. Supp.2d 115, 121 (N.D.N.Y. 1998). The party opposing summary judgment "must conclusively justify his entitlement to the shelter of Rule 56(f) by presenting specific facts explaining the inability to make a substantive response as required by Rule 56(e) and by specifically demonstrating 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *SEC* v. *Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980) (quoting *Willmar Poultry Co.* v. *Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S. Ct. 1116, 47 L.Ed.2d 320, (1976)), *cert. denied*, 449 U.S. 1082, 101 S. Ct. 866, 66 L.Ed.2d 806 (1981).

In the present case, the affidavit of Plaintiff's attorney falls well short of demonstrating any of the

Hudson elements enumerated above.[7] *See Szarka*, 17 F. Supp.2d at 122. Indeed, Plaintiff does not even recognize the application of the four-part inquiry or the requirements set forth in Fed. R. Civ. P. 56(f); rather, she simply asserts in conclusory fashion that summary judgment is premature due to the absence of discovery. Clearly, such a general assertion is insufficient to satisfy the specific requirements of Rule 56(f). *See Hudson*, 891 F.2d at 414; *see also Paddington Partners* v. *Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) ("Rule 56(f) is not a shield against all summary judgment motions. Litigants seeking relief under the rule must show that the material sought is germane to the defense . . . .") (internal quotations omitted); *United States* v. *Private Sanitation Ind. Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375, 377 (2d Cir. 1993) (affirming Rule 56(f) denial when affidavit did not describe "in specific terms evidence that might be forthcoming and would demonstrate that a genuine issue actually existed"); *Tucker Leasing Capital Corp.* v. *Marin Med. Management, Inc.*, 833 F. Supp. 948, 960-61 (E.D.N.Y. 1993) ("The Court may reject a request for further discovery pursuant to Rule 56(f) if the request is based on pure speculation as to what would be discovered.").

Furthermore, "Rule 56(f) is not appropriate where the discovery allegedly desired 'pertains to information already available to the non-moving party.'" *Mason Tenders Dist. Council Pension Fund* v. *Messera*, 958 F. Supp. 869, 894 (S.D.N.Y. 1997) (quoting *Frankel* v. *ICD Holdings S.A.*, 930 F. Supp. 54, 66 (S.D.N.Y.

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[7] Notably, the affidavit supplied by Plaintiff's attorney contains proposed language should the Court allow Plaintiff to amend her Amended Complaint.

1996)). Here, Plaintiff alleges numerous grounds in her Title VII claim against Defendant. She should, therefore, be able to demonstrate, at the very least, a material issue of fact to defeat summary judgment through her own affidavit, and by relying on her own witnesses and documents. Accordingly, Plaintiff has failed to show that summary judgment is premature under Rule 56(f).

Additionally, Plaintiff's reliance on her Amended Complaint to refute the attached declarations and documentary evidence in support of Defendant's motion for summary judgment is plainly improper. It is axiomatic that when the moving party has supported the motion by affidavits and documentary evidence, the nonmovant

> [M]ay not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [ ] Rule [56], must set forth specific facts showing that there is a genuine issue [of material fact] for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). Because Plaintiff failed to respond with affidavits or otherwise as required by Rule 56(e), the only question that remains is whether summary judgment is "appropriate"; that is, whether Defendant's evidentiary material establish an absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Champion* v. *Artuz*, 76 F.3d 483, 485 (2d Cir. 1996); *see also* CHARLES A. WRIGHT & ARTHUR R. MILLER, 10A FEDERAL PRACTICE AND PROCEDURE § 2738, at 520-28 (2d ed. 1983).

III. Plaintiff's Title VII Claims

Plaintiff alleges claims of employment discrimination, harassment, and retaliation in violation of Title VII. Specifically, 42 U.S.C. § 2000e-16 provides the exclusive remedy for claims alleging discriminatory practices in federal employment based upon race, color, religion, sex, or national origin. *See Brown* v. *General Servs. Admin.*, 425 U.S. 820, 829-35, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976); *Boyd* v. *United States Postal Serv.*, 752 F.2d 410 (9th Cir. 1985). *Smith* v. *United States Postal Serv.*, 742 F.2d 257 (6th Cir. 1984). Under that section, the right to bring a federal action is predicated upon the timely exhaustion of administrative remedies, as established by Equal Employment Opportunity Commission ("EEOC") regulations. *See Brown*, 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976); *Butts* v. *New York Dep't of Housing, Preservation & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993).

In addition, there are special regulations governing labor-related actions by federal employees, requiring federal agencies such as the Postal Service to adopt procedures for processing discrimination complaints by their employees. *See* 29 C.F.R. §§ 1614.103(b)(3), 1614.104-.106 (1998); *see generally*, 29 C.F.R. § 1614 *et seq.* (Federal Sector Equal Employment Opportunity Regulations). These procedures provide that, "[a]ggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter." *See* 29 C.F.R. § 1614.105(a). An employee must contact the Counselor "within 45 days of the date of the matter alleged to be

discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." *See* 29 C.F.R. § 1614.105(a)(1). The 45-day limit may be extended by the Counselor if the employee shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, or if some other circumstances beyond the employee's control justify extension. *See* 29 C.F.R. § 1614.105(a)(2).

A timely filing of an EEOC charge is not, however, a "jurisdictional prerequisite" to initiating a suit. *See Boyd*, 752 F.2d at 414; *McNight* v. *Dormitory Auth. of the State of New York*, 995 F. Supp. 70, 76 (N.D.N.Y. 1998). Thus, the 45 day time limit functions as a "statute of limitations and is subject to waiver, estoppel, and equitable tolling." *Id.* The agency is required to dismiss complaints that fail to comply with the time limits, see 29 C.F.R. § 1614.107(b), and is required to issue a final agency decision including notice of the employee's right to appeal. *See* 29 C.F.R. § 1614.110. An employee may appeal the agency's final decision to the Equal Employment Opportunity Commission within 30 days of the employee's receipt of the final decision. *See* 29 C.F.R. §§ 1614.401(a), 1614.402(a)-(b). Alternatively, the employee may file a civil action in the appropriate United States District Court within 90 days of the employee's receipt of the final decision. *See* 29 C.F.R. § 1614.408(a). To withstand Defendant's summary judgment motion, Plaintiff must demonstrate that she has complied with these requirements.

A. Retaliation Claim

1. Exhaustion of Administration Remedies—Reasonably Related Claims

Defendant argues that the cause of action sounding in retaliation is not included in, nor reasonably related to, any EEOC charge and is therefore barred due to Plaintiff's failure to exhaust her administrative remedies.

"A district court only has jurisdiction to hear Title VII claims that either are included in an EEOC charge or are based on conduct subsequent to the EEOC charge which is 'reasonably related' to that alleged in the EEOC charge." *Butts*, 990 F.2d at 1401 (citing *Stewart* v. *United States Immigration and Naturalization Serv.*, 762 F.2d 193, 198 (2d Cir. 1985); *Almendral* v. *New York State Office of Mental Health*, 743 F.2d 963, 967 (2d Cir. 1984); *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 131 (2d Cir. 1981); *Kirkland* v. *Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980)). The purpose of the exhaustion requirement is to "encourage settlement of discrimination disputes through conciliation and voluntary compliance." *Id.* The filing requirement provides notice to the party charged with a violation and gives that party an opportunity to comply with Title VII before the commencement of a lawsuit and to participate in conciliation. *See Davis* v. *Weidner*, 596 F.2d 726, 729 (7th Cir. 1979); *McNight*, 995 F.Supp. at 76.

a. Whether the Allegations of Retaliation Were Included in an EEOC Charge

A complaint "must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint." *See* 29 C.F.R. § 1614.106(c). In this case, Plaintiff filed her EEO Complaint on February 2, 1998, alleging "sexual discrimination and sexual harassment for the period October 14, 1994 to September 25, 1997." EEO Complaint, at ¶ 5. Plaintiff goes on to allege that "Gerling began a campaign of sexual discrimination and harassment against [Plaintiff]." *Id.* at ¶ 8. Notably, these statements fail to mention any reference to a claim of retaliation. Furthermore, Plaintiff failed to either mark retaliation as a type of discrimination alleged in her EEO Complaint or identify the prior protected EEO activity underlying such a claim. *See Quinn* v. *Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998); *Gallagher* v. *Delaney*, 139 F.3d 338, 349 (2d Cir. 1998); *Montalvo* v. *United States Postal Serv.*, 1996 WL 935448, at *1 (2d Cir. April 19, 1996). A careful reading of the complaint evinces allegations of sexual discrimination and harassment against Gerling only. Thus, Plaintiff's EEO Complaint fails to adequately place Defendant on notice of potential allegations of retaliation.

Plaintiff argues that "the underlying administrative complaint does allege that Gerling retaliated against [ ] Fitzgerald because she resisted his sexual advances." Pl. Mem. of Law at 18; EEO Complaint at ¶¶ 10, 15. This, however, is insufficient to establish a claim of prior protected EEO activity for which Gerling retaliated against the Plaintiff. *See Rashid* v. *Beth Israel*

Med. Ctr., 1998 WL 689931, at *2 (S.D.N.Y. October 2, 1998) (holding that rejection of sexual advances is not a protected activity under Title VII); *Del Castillo* v. *Pathmark Stores, Inc.*, 941 F. Supp. 437, 438 (S.D.N.Y. 1996). As the Court noted in *Del Castillo:*

> While [ ] protected activity sometimes consists of filing a lawsuit or formal complaint with an agency, it may also take the form of less formal protests, such as making complaints to management, writing critical letters to customers, or expressing support of co-workers who have filed charges. But even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged "protected activity" consists simply of declining a harasser's sexual advances, which is all that is alleged here by way of "protected activity." If it were otherwise, every harassment claim would automatically state a retaliation claim as well.

941 F. Supp. at 438-39.

Notably, it is not until Plaintiff filed her federal complaint in June 1998 that Plaintiff indicates that Gerling's retaliation stemmed, in part, from her threat to file an EEO Complaint. *See* Amended Compl. at ¶ 88. Indeed, Plaintiff concedes that she "did not, in any of her administrative documents, specifically allege that there was retaliation against her for threatening to file an EEO complaint in April 1995." Pl. Mem. of Law at 18. Accordingly, Plaintiff's unambiguous language in her EEO Complaint reasonably limited the inquiry of the agency solely to allegations of sexual harassment and discrimination. While the EEOC's failure to investigate a particular claim in a charge would not preclude the subsequent commencement of a lawsuit based upon the charge as a whole, *see Schnellbaecher v. Baskin*

Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989), the aggregation of the above-listed factors militates against a finding that the EEO Complaint properly included a charge of retaliation filed with the Postal Service. Accordingly, the Court finds that there was no allegation of retaliation in the charge filed with the Postal Service.

Plaintiff responds that she should nevertheless be permitted to raise her retaliation claim "because it is reasonably related to the charge and specific incidents of discrimination . . . raise[d] in [Plaintiff's] administrative complaint, and thus would fall within the scope of the EEO investigation which could reasonably expected to have grown out of the charge of discrimination." Pl. Mem. of Law at 18-19. Thus, Plaintiff argues that the exceptions to the exhaustion requirement apply. The Second Circuit has "recognized three kinds of situations where claims not alleged in an EEOC charge are sufficiently related to the allegations in the charge that it would be unfair to civil rights plaintiffs to bar such claims in a civil action." *Butts*, 990 F.2d at 1402.

1. Whether the Conduct Falls Within the Scope of the EEOC Investigation

The first "reasonably related" claim is "essentially an allowance of loose pleading" and allows "claims not raised in the charge to be brought in a civil action where the conduct complained of would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" *Id.* (quoting *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 107 n. 10 (2d Cir. 1978)). It is

of no moment whether the EEOC actually investigated the claim; it is the opportunity to do so that is key. *See McNight*, 995 F. Supp. at 77; *Dargento* v. *Bally's Holiday Fitness Cntrs.*, 990 F. Supp. 186, 193 (W.D. N.Y. 1997). However, "the loose pleading allowance is not satisfied by vague, generalized statements. Specific factual allegations must be made in order for the EEOC to be able to investigate them reasonably." *Cooper* v. *Xerox Corp.*, 994 F. Supp. 429, 432 (W.D.N.Y. 1998).

In the present matter, the January 1998 charge filed with the Postal Service unambiguously stated that Plaintiff limited her charges to sexual discrimination and sexual harassment for the period October 1994 through September 1997. *See* EEO Complaint at ¶¶ 5, 8. As indicated previously, Plaintiff failed to either list retaliation as a type of discrimination on the EEO Complaint Form or identify the protected activity that underlies such a retaliation claim. Thus, the investigation into Plaintiff's charges, the Postal Service's handling of these charges, and even the underlying reasons for the charges, would not fall within the scope of, and could not reasonably be expected to grow into, an investigation of a claim of retaliation. *See, e.g.*, *Szarka*, 17 F. Supp.2d at 124 (claim of hostile work environment does not reasonably grow out of a claim of sex and age discrimination); *Cooper*, 994 F. Supp. at 433 (charge of racial discrimination does not support claim for hostile work environment or harassment); *Tavarez* v. *Chemical Bank*, 1998 WL 337071, at *3 (S.D.N.Y. June 25, 1998) ("A charge of disability discrimination cannot reasonably be expected to grow out of a charge of discri-mination based on national origin."); *DeJesus* v. *Allstate Ins. Co.*, 1998 WL 241726, at *4 (S.D.N.Y. May 11, 1998) (a claim of redlining is not reasonably

related to a charge of racial discrimination); *Harris* v. *New York City Dept. of Homeless Servs. Eligibility Unit*, 1998 WL 205334, at *9 (S.D.N.Y. April 28, 1998) (a charge of gender discrimination and a retaliation claim for filing sexual harassment charges fails to satisfy the reasonably related test); *Carrasco* v. *New York City Off- Track Betting Corp.*, 858 F. Supp. 28, 33 (S.D.N.Y. 1994) (retaliation claim not reasonably related to charge of sexual discrimination), *aff'd*, 50 F.3d 3 (2d Cir. 1995). Thus, this exception does not apply.

2. Retaliation

"The second type of 'reasonably related' claim is one alleging retaliation by an employer against an employee for filing an EEOC charge." *Butts*, 990 F.2d at 1402. In these cases, the exhaustion requirement is relaxed "based on the close connection of the retaliatory act to both the initial discriminatory conduct and the filing of the charge itself." *Id.* Thus, this exception addresses those situations where the plaintiff has filed an EEOC charge and the EEOC has the "opportunity to investigate and mediate the claims arising from the underlying discriminatory acts alleged." *Id.* Notably, Plaintiff did not allege in her EEO Complaint that Gerling retaliated against her for filing an EEO charge; rather, Plaintiff alleged that the retaliation resulted from her rejection of Gerling's sexual advances. *See* EEO Complaint at ¶¶ 21-24. Moreover, because the facts underlying Plaintiff's retaliation claim occurred *prior* to the filing of her EEO Complaint, this exception is inapplicable.

3. Allegations of Further Incidents of Discrimination

"The third type of 'reasonably related' claim is where a plaintiff alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge."[8] *Butts*, 990 F.2d at 1402. Because the EEO Complaint here alleged sexual discrimination and sexual harassment arising from Gerling's actions, it cannot therefore be said that Plaintiff's claim of retaliation is a further incident of discrimination carried out in the same manner alleged in the EEO Complaint. *See Butts*, 990 F.2d at 1402. Thus, this exception also is inapplicable. Accordingly, Plaintiff's cause of action based upon retaliation is barred due to her failure to exhaust administrative remedies.

Even if the Court was to find the above allegations reasonably related to Plaintiff's EEO Complaint, these allegations occurred more than 45 days prior to her

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[8] Notably, many of Plaintiff's allegations occurred prior to Plaintiff filing her EEO Complaint. As this Court recognized in *McNight*, there is authority that the "reasonably related" test only applies to satisfy exhaustion of acts occurring subsequent to the filing of the administrative charge. *See McNight*, 995 F. Supp. at 78 n. 3; *see also Butts*, 990 F.2d at 1401 ("A district court only has jurisdiction to hear claims that . . . are based on conduct *subsequent to* the EEO charge which is reasonably related to that alleged in the EEOC charge") (emphasis added) (internal quotation marks and citations omitted); *Alfano* v. *Costello*, 940 F. Supp. 459, 469 (N.D.N.Y. 1996) (reasonably related test applies only to "discriminatory conduct that occurred *after* a plaintiff filed her EEOC charge") (emphasis added). However, this issue appears unsettled. While *Butts* distills a test that by its terms applies only to post-EEOC filing conduct, the *Butts* opinion, in fact, analyzed the pre-EEOC allegations under the reasonably related test. *See Butts*, 990 F.2d at 1403.

filing with the Postal Service.[9] Thus, they are time-barred. Moreover, Plaintiff is unable to toll the limitations period by availing herself of the continuing violation doctrine.

"Under [the] continuing violation doctrine, where the defendant has engaged in a continuous policy of discrimination, acts in furtherance of that policy are not viewed in isolation. In such circumstances, if the charge has been filed [ ] later than [the prescribed limitations period] after the last act by the defendant pursuant to its policy, the plaintiff may recover for earlier acts of discrimination as well." *Choi* v. *Chemical Bank*, 939 F. Supp. 304, 311 (S.D.N.Y. 1996) (internal quotation marks and citations omitted). Stated differently, when evidence of an ongoing discriminatory policy or practice is present, a court may consider all of an employer's actions allegedly taken pursuant to such policy, even if some are time-barred. *Van Zant* v. *KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996). Nonetheless, "multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." *Quinn*, 159 F.3d at 765 (citing *Lambert* v. *Genesee Hosp.*, 10 F.3d 46, 52 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052, 114 S. Ct. 1612, 128 L.Ed.2d 339 (1994); *Cornwell* v. *Robinson*, 23 F.3d 694, 704 (2d Cir. 1994)). A continuing violation may be found if the proof shows a specific and ongoing policy or

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[9] In her EEO Complaint and federal complaint, Plaintiff alleges that Gerling's sexual advances began around October 1994 and the letter of warning issued by Gerling which prompted Plaintiff's threat to file an EEO complaint occurred around April 1995. *See* EEO Complaint at ¶¶ 8-9, 13-14; Amended Compl. at ¶¶ 32-36, 62-67, 78-89.

practice of discrimination, or if an employer allows specific, related instances of discrimination to continue unremedied such that those instances amount to a discriminatory practice or policy. *Van Zant*, 80 F.3d at 713; *Cornwell*, 23 F.3d at 703; *Butts*, 990 F.2d at 1404. Nevertheless, "the continuing violation doctrine is disfavored in this Circuit, and will be applied only upon a showing of compelling circumstances." *Lloyd* v. *WABC-TV*, 879 F. Supp. 394, 399 (S.D.N.Y. 1995); *see also Carrasco*, 858 F. Supp. at 31 ("'The Second Circuit has recently reasserted the law of this Circuit that, unless the plaintiff alleges discrimination by virtue of a specific official policy or mechanism, claims of continuing violation will not lie.'") (quoting *Page* v. *New York City Off-Track Betting, Inc.*, 1993 WL 426865, at *2 (S.D.N.Y. October 22, 1993) (noting that the continuing violation theory is to be applied only if "warranted by compelling circumstances")); *Blesedell* v. *Mobil Oil Co.*, 708 F. Supp. 1408, 1415 (S.D.N.Y. 1989); *LaBeach* v. *Nestle Co., Inc.*, 658 F. Supp. 676, 687 (S.D.N.Y. 1987). Accordingly, courts have limited the applicability of the doctrine to instances involving a specific official policy or mechanism. *See Cook* v. *Pan Am. World Airways, Inc.*, 771 F.2d 635 (2d Cir. 1985) (disriminatory seniority list), *cert. denied*, 474 U.S. 1109, 106 S. Ct. 895, 88 L.Ed.2d 929 (1986); *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981) (discriminatory fire department tests), *cert. denied*, 455 U.S. 988, 102 S. Ct. 1611, 71 L.Ed.2d 847 (1982).

Plaintiff's claim, in its entirety, sounds in sexual discrimination and sexual harassment. She makes no allegations that Defendant maintained a retaliatory employment policy. Thus, Plaintiff's allegations of re-

taliation cannot be read to state a continuing violation claim. *See Quinn*, 159 F.3d at 765; *Lambert*, 10 F.3d at 53; *Ryan* v. *New York State Thruway Auth.*, 889 F. Supp. 70, 77 (N.D.N.Y. 1995) (citing *Miller* v. *International Tel. & Tel. Corp.*, 755 F.2d 20, 25 (2d Cir.), *cert. denied*, 474 U.S. 851, 106 S. Ct. 148, 88 L.Ed.2d 122, *reh'g denied*, 474 U.S. 1015, 106 S. Ct. 552, 88 L.Ed.2d 479 (1985)).

Because Plaintiff's EEO Complaint and federal complaint fail to allege a formal and ongoing retaliatory policy or mechanism, she may not avoid the 45 day limitations period. Plaintiff's retaliation claim is therefore also dismissed as time barred.

B. Disparate Treatment Claim

Plaintiff's second claim alleges that she has "been the victim of disparate treatment with respect to her terms, conditions and privileges of employment because she is female, and because she refused to engage in a sexual relationship with Gerling, her direct supervisor." Amended Compl. at ¶ 124. Specifically, Plaintiff states that as a result of rejecting Gerling's sexual advances, she was "continually subjected [ ] to harsher and more critical treatment than any of her co-workers." Amended Compl. at ¶ 96. This disparate treatment was evidenced by instances where:

> [S]imilarly situated male postal workers under [ ] Gerling's supervision were not subject to . . . mistreatment as [Plaintiff was] . . . and other female postal workers who have had sexual relations with [ ] Gerling have been treated more favorable than [Plaintiff] and have not been subject to [ ] Gerling's hostility, humiliation, anger, inti-

midation, and improper discipline [as] suffered by [Plaintiff].

EEO Complaint at ¶¶ 26-27.

Plaintiff alleges that Gerling's mistreatment began in early 1995, and continued through September 1997, where Plaintiff "was prohibited from taking earned days off, forced to work unwanted overtime, and forced to work above and beyond the level of competence of others similarly situated" for rejecting Gerling's sexual advances. EEO Complaint at ¶¶ 20-21. During this three year period, Plaintiff reported Gerling's actions to Postmaster King three times. *See* Amended Compl. at ¶ 99. Plaintiff further argues that these conditions "culminated in an incident on or about September 25, 1997, during which Gerling screamed a profanity at Plaintiff and physically intimidated her" during a meeting to discuss Plaintiff's job performance. *See id.* at ¶ 28.

Defendant argues that, with the exception of the September 25, 1997 incident, all of Plaintiff's allegations of disparate treatment arose later than 45 days from the time Plaintiff contacted an EEO Postal Service Counselor.[10] Thus, Defendant contends that all allegations related to conduct arising before September 9, 1997 are timed barred and that the remaining September 25, 1997 incident is insufficient, as a matter of law, to constitute disparate treatment. *See* Def. Mem. of Law at 10. Plaintiff counters that the continuing violation theory tolled the applicable limitations period.

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[10] As previously noted, Plaintiff contacted an EEO Postal Service Counselor on October 24, 1997, and filed her EEO Complaint on January 30, 1998.

In the present case, Plaintiff's continuing violation argument fails because she has not alleged an "ongoing discriminatory practice or policy" in her administrative complaint. *McNight*, 995 F. Supp. at 79; *see also Quinn*, 159 F.3d at 765; *Lightfoot* v. *Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997) (holding that continuing violation theory is inapplicable to instances where "discrete incidents of discrimination [ ] are unrelated to an identifiable policy or practice"). Rather than detailing specific instances evincing a formal discriminatory practice or policy, Plaintiff merely alleges hostile behavior by Gerling directed solely at Plaintiff for rejecting Gerling's sexual advances. *See Lightfoot*, 110 F.3d at 907 ("The continuing violation exception applies when there is evidence of specific discriminatory practices, such as the repeated use of discriminatory seniority lists or employment tests."). Moreover, the September 1997 incident filed within the limitations period neither constitutes an independently actionable discriminatory act nor an incident in furtherance of an ongoing policy of discrimination. *See Lambert*, 10 F.3d at 53 (holding that the continuing violation exception applies to "any incident of discrimination in furtherance of an ongoing policy of discrimination"); *Kassaye* v. *Bryant College*, 999 F.2d 603, 606 (1st Cir. 1993) ("For appellant's continuing violation theory to succeed, [the timely filed] incident must have constituted an independently actionable discriminatory act"). Similarly, Plaintiff's federal complaint fails to allege sufficient facts to give rise to a continuing violation. *See, e.g.*, *Dixit* v. *City of New York Dep't of General Servs.*, 972 F. Supp. 730, 736 (S.D.N.Y. 1997); *Neilson* v. *Colgate-Palmolive Co.*, 1997 WL 297051, at *1 (S.D.N.Y. June 4, 1997). Accordingly, the continuing violation doctrine does not apply to render Plaintiff's claims of discrimina-

tion timely. Thus, the September 25, 1997 incident is the only allegation that was timely filed in Plaintiff's administrative complaint.

To establish a prima facie case of disparate treatment, Plaintiff must show: (1) membership in a protected class; (2) qualification for the position; (3) an adverse employment decision; and (4) that the decision took place under circumstances giving rise to an inference of discrimination. *See Austin* v. *Ford Models, Inc.*, 149 F.3d 148, 152 (2d Cir. 1998).

Plaintiff's disparate treatment claim must fail because she cannot show that she suffered an adverse employment action as a result of the September 25, 1997 incident in which Gerling yelled at Plaintiff, used profanity, and pointed his finger at her in an intimidating manner during a meeting. *See* Amended Compl. at ¶¶ 104-05; EEO Complaint at ¶ 28. This, in and of itself, is insufficient to show that Plaintiff suffered a materially adverse change in the terms and conditions of her employment. *See Torres* v. *Pisano*, 116 F.3d 625, 640 (2d Cir.) (employee's feeling "frightened" and "intimidated" does not constitute adverse employment action) (citing *McKenney* v. *New York City Off-Track Betting Corp.*, 903 F. Supp. 619, 623 (S.D.N.Y. 1995)), *cert. denied*, 522 U.S. 997, 118 S. Ct. 563, 139 L.Ed.2d 404 (1997); *see also United States* v. *New York City Transit Authority*, 97 F.3d 672, 677 (2d Cir. 1996) (requiring treatment that affects the employee's work, working conditions, or compensation). *Compare Austin*, 149 F.3d at 153 (unreasonable workload and forced overtime without compensation constitutes discrimination with respect to terms and conditions of plaintiff's employment); *Annis* v. *County of Westchester*, 136 F.3d 239, 248 (2d Cir. 1998) (discrimi-

natory denial of overtime pay on basis of sex violates Title VII).

Plaintiff alleges a claim of constructive discharge to establish the requisite adverse employment action. Specifically, Plaintiff alleges that, as a result of Gerling's alleged misconduct, and King's failure to remedy the situation, she has suffered a medical disability for which Plaintiff has been on medical leave since September 25, 1997 and is currently receiving medical treatment.[11]

Constructive discharge occurs when "an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily." *Chertkova*, 92 F.3d at 89. Working conditions are deemed intolerable if they are "'so difficult or unpleasant that a reasonable person in the employee's shoes should have felt compelled to resign.'" *Id.* (quoting *Lopez* v. *S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987); *Christopher-Ketchum* v. *Agway Energy Prods.*, 988 F. Supp. 610, 616 (N.D.N.Y. 1997). A claim of constructive discharge cannot be maintained, however, if the employee merely alleges dissatisfaction with the nature of his assignments, *Pena* v. *Brattleboro Retreat*, 702 F.2d 322, 325-26 (2d Cir. 1983), unfair criticism, *Clowes* v. *Allegheny Valley Hosp.*, 991 F.2d 1159, 1160-61 (3d Cir.), *cert. denied*, 510 U.S. 964, 114 S. Ct. 441, 126 L.Ed.2d 374 (1993), or if the working conditions are

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[11] Specifically, Plaintiff alleges that she has been diagnosed with "post traumatic stress disorder and severe depression," requiring her to undergo "ongoing psychiatric and psychological counseling and treatment." EEO Complaint at ¶ 33.

difficult or unpleasant. *See Stetson* v. *NYNEX Serv. Co.*, 995 F.2d 355, 360 (2d Cir. 1993).

The September 1997 incident is insufficient to sustain a claim of constructive discharge. Gerling's use of profanity and yelling and pointing his finger did not make Plaintiff's working conditions "so intolerable that [she] was forced into an involuntary resignation." *Lopez*, 831 F.2d at 1188. Indeed, Gerling's actions neither drastically altered Plaintiff's working conditions nor compelled a reasonable person in her position to resign. Thus, Plaintiff has failed to establish a prima facie case of disparate treatment.

C. Hostile Work Environment Claim

Plaintiff's third claim alleges sexual harassment based on a hostile work environment. Specifically, Plaintiff alleges that soon after Gerling started, he subjected her to unwelcome sexual advances that included:

> [S]tanding in close proximity to [Plaintiff], while softly laying his hand on her shoulder; shaking hands with her on a daily basis, and softly holding her hand for an unusually long period of time; entering her work cubical [sic], standing in close proximity to her, and effectively blocking her only means of egress; staring at her inappropriately while she was working at her sorting station or loading her mail truck; embracing her at the worksite; telling her that she looked nice in shorts; directing her to see him in his office, and then attempting to engage her in non-work related conversations; staring inappropriately at her body and asking her how much she weighed; telling her that he liked her long hair; inviting her to lunch; boasting

> to her that he will 'father [her] first child'; asking her to meet him after work; running his hand through her hair; offering to teach her 'relaxation techniques'; and inviting her to go dancing with him.

Pl. Mem. of Law at 3-4; *see also* Amended Compl. at ¶¶ 14-32, 38, 42, 51-52.

Notably, the events that give rise to Plaintiff's hostile work environment claim occurred as early as October 1994. At most, Plaintiff's administrative charge and federal complaint describe "multiple incidents of discrimination" directed solely at Plaintiff, rather than a formal or widespread identifiable discriminatory policy or practice. *See Quinn*, 159 F.3d at 765; *Lambert*, 10 F.3d at 53. Indeed, many of the allegations supporting Plaintiff's hostile work environment claim address actions that occurred only once or on a few occasions. *See* EEO Complaint at ¶¶ 12-13, 16; Amended Compl. at ¶¶ 21-26, 32, 64-65, 71.

Similar to the Court's analysis of Plaintiff's disparate treatment claim, the September 1997 incident filed within the limitations period neither constitutes an independently actionable discriminatory act nor an incident in furtherance of an ongoing policy of discrimination. *See Lambert*, 10 F.3d at 53; *Kassaye*, 999 F.2d at 606. Accordingly, Plaintiff is unable to use the continuing violation theory to render timely those allegations falling outside the limitations period. Thus, the September 25, 1997 incident is the only allegation that was timely filed in Plaintiff's administrative complaint.

To establish a prima facie case of a hostile work environment, Plaintiff must allege conduct "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

environment.'" *Distasio* v. *Perkin Elmer Corp.*, 157 F.3d 55, 62 (2d Cir. 1998) (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993)); *Schwapp*, 118 F.3d at 110. In determining whether an employee's environment is hostile or abusive, courts employ a totality of circum-stances approach and consider "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance.'" *Id.; see also Schwapp*, 118 F.3d at 111 (examining the quantity, frequency, and severity of the underlying conduct); *Torres*, 116 F.3d at 631 (requiring incidents to be repeated and continuous); *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (holding that a hostile work environment exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult"); *Carrero* v. *New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989) ("The incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive."). The Court is cognizant, however, that "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability." *Tomka*, 66 F.3d at 1305; *see also Torres*, 116 F.3d at 631 n. 4. These factors must be evaluated from both an objective and subjective viewpoint. *See id.; Gallagher*, 139 F.3d at 347; *Schwapp*, 118 F.3d at 110 ("The conduct alleged must be severe and pervasive enough to create an environment that 'would reasonably be perceived, and is perceived, as hostile or abusive.'") (citing *Harris*, 510 U.S. at 22, 114 S. Ct. 367).

The September 1997 incident is not sufficiently severe to constitute actionable sex harassment or constructive discharge. Indeed, Gerling's actions during that meeting neither drastically altered Plaintiff's working conditions nor compelled a reasonable person in her position to resign. Thus, Plaintiff has failed to establish a prima facie case of hostile work environment.

D. Leave to Amend the Amended Complaint

Plaintiff has cross-moved to add allegations "concerning constructive discharge; to clarify allegations about Gerling's initial employment date; and to incorporate the underlying documents filed before the EEOC into the complaint." Pl. Mem. of Law at 2. Defendant opposes Plaintiff's request for leave to amend the Amended Complaint as "[Plaintiff] now wishes to change the dates of the events to conform with probative evidence provided by Defendant [ ] to defeat a dispositive motion." Def. Reply Mem. of Law at 5. The Court agrees.

Under Fed. R. Civ. P. 15(a), leave to amend "shall be freely given when justice so requires." Such leave should be denied, however, when it would be futile, cause undue delay or prejudice, or when it is sought in bad faith. *See Foman* v. *Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962).

In this case, it would be futile to permit Plaintiff to file a second Amended Complaint, which omits and alters admissions made in the Amended Complaint and raises allegations that are timed barred.[12] *See, e.g.*,

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[12] With respect to Plaintiff's request to incorporate documents filed with the EEO agency of the Postal Service to her Amended Complaint, the Court appropriately considered these documents in

Austin, 149 F.3d at 155. In addition, for the reasons stated earlier, Plaintiff's proposed allegations regarding her resignation cannot, as a matter of law, give rise to a claim of constructive discharge. Accordingly, Plaintiff's request for leave to amend her Amended Complaint is denied.[13]

III. CONCLUSION:

For all of the foregoing reasons, then, it is hereby

ORDERED, that Defendant's motion for summary judgment is GRANTED, dismissing Plaintiff's Amended Complaint in its entirety; and it is further

ORDERED, that Plaintiff's cross-motion for leave to amend her Amended Complaint is DENIED in all respects.

IT IS SO ORDERED.

MEMORANDUM—DECISION & ORDER

The procedural background and facts of this case are set forth in the Court's decision in *Fitzgerald* v. *Henderson*, 490 F. Supp.2d 36 (N.D.N.Y. 1998), familiarity with which is presumed. In that decision, the Court granted defendant's motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 56. Judgment was entered on January 5, 1999. On January 14, 1999, plaintiff Lisa Fitzgerald ("plaintiff" or "Fitzgerald") filed the present motion for reconsideration pursuant

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deciding Defendant's summary judgment motion. *See McNight*, 995 F. Supp. at 74-75.

[13] Because the Court is dismissing Plaintiff's Amended Complaint in its entirety, Defendant's request to strike those factual allegations concerning Plaintiff's request for punitive damages is rendered moot.

to Fed. R. Civ. P. 59(e), asserting that the Court erred in dismissing her hostile work environment claim.[1]

I. Discussion

Reconsideration of a prior decision is discretionary and the factors that generally compel reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atlantic Airways Ltd.* v. *National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.), *cert. denied*, 506 U.S. 820, 113 S. Ct. 67, 121 L.Ed.2d 34 (1992); *see also Morris* v. *State of New York*, 1995 WL 155953, at *2 (N.D.N.Y. April 5, 1995); *Waye* v. *First Citizen's Nat'l Bank*, 846 F. Supp. 310, 314 (M.D. Pa.), *aff'd*, 31 F.3d 1175 (3d Cir. 1994). It is well-settled that "Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple' . . . ." *Sequa Corp.* v. *GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998); *see also Morris*, 1995 WL 155953, at *2 (Motion for reconsideration "'is not to be used as a means to reargue matters already argued and disposed of by prior rulings or to put forward additional arguments which it could have made but neglected to make before judgement.'") (quoting *Aquilio v. Police Benevolent Ass'n of New York State Troopers, Inc.*, 1994 WL 494639, *2, 1994 U.S. Dist. LEXIS 12813, at *7 (N.D.N.Y. August 15, 1994), *appeal dismissed without opinion*, (2d Cir. 1994) and *McDowell Oil Serv.* v. *Interstate Fire and Cas.*, 817 F. Supp. 538, 541 (M.D. Pa. 1993)); *Waye*, 846 F. Supp.

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[1] Plaintiff's reconsideration motion is limited to her hostile work environment claim and does not challenge the Court's dismissal of her retaliation and disparate claims.

314. The motion for reconsideration "is an extraordinary remedy which should be used sparingly," 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2D § 2810.1 (West 1995), and therefore, "'is not intended merely to . . . give a disappointed litigant another chance.'" *Morris*, at *2 (quoting *Agola* v. *Hagner*, 678 F. Supp. 988, 991 (E.D.N.Y. 1987)). Moreover, the decision of whether to grant a motion for reconsideration lies within the sound discretion of the district court. *See Doolittle* v. *Ruffo*, 1996 WL 167662, at *2 (N.D.N.Y. April 1, 1996). Naturally, a court is disinclined to reconsider a prior decision unless a party has satisfied one of the three factors noted above.

In requesting that this Court reconsider its dismissal of her hostile work environment claim, plaintiff argues that: (1) she did not have notice that defendant moved for summary judgment on that claim; and (2) the Court erred by not considering her verified complaint and EEO affidavit, which plaintiff contends raised genuine issues of material fact sufficient to preclude summary judgment on her hostile work environment claim. *See* Pl. Mem. of Law at 1. In response, defendant argues that the factual allegations and legal arguments in plaintiff's opposition papers clearly establish that she was on notice that "the Court should and would address the viability of her hostile work environment claim . . . ." Def. Mem. of Law at 8. Defendant also notes that in deciding defendant's summary judgment motion, the Court appropriately considered documents filed with the EEO agency which were not incorporated into the Amended Complaint. *See id.* at 9.

A. Whether Plaintiff Was on Notice of Summary Judgment Regarding Hostile Work Environment Claim

The Court addressed the issue of notice when it considered defendant's summary judgment motion based on plaintiff's contention that summary judgment was premature because the parties had not yet conducted discovery. *See Memorandum-Decision & Order*, at 495-96. In determining that summary judgment was appropriate, the Court noted that plaintiff's opposition papers indicated that she was on notice that defendant's motion would be treated as a motion for summary judgment. *See id.* at 496 n.6. The Court also noted that although defendant's motion moved for partial summary judgment, his moving papers addressed *all* of the claims raised by plaintiff under Title VII. *See id.* at 496 n.4.

The factual allegations and legal arguments presented in plaintiff's opposition papers also addressed, at considerable length, plaintiff's hostile work environment claim. These factual allegations included unwelcome sexual advances, see Pl. Mem. of Law at 3 (citing Amended Complaint at ¶¶ 14-32; 38, 42, 51-54, 56), and attempts by her supervisor, Timothy Gerling, ("Gerling") to engage in a sexual relationship with Fitzgerald. *See id.* at 4 (citing Amended Complaint at ¶¶ 73-74). When these sexual advances were rejected, plaintiff alleged that Gerling's attitude toward her "shifted to one of *hostility*," and Gerling became "increasingly *hostile and abusive* towards plaintiff," *id.* at 4-5 (emphasis added) (citing Amended Complaint at ¶¶ 72, 79-82, 85-90), requiring Postmaster King to intervene and "stop Gerling's *hostile and harassing behavior* toward [plaintiff]." *Id.* at 5 (emphasis added)

(citing Amended Complaint at ¶¶ 99-101). Significantly, these allegations, which directly relate to plaintiff's hostile work environment claim, were relied on by plaintiff in the first point of her Memorandum of Law to establish a "viable cause of action under Title VII" sufficient to deny defendant's motion for summary judgement. *Id.* at 8. In that same section, plaintiff further argues that she "has sufficiently pleaded claims of *hostile work environment* and disparate treatment." *Id.* at 9 (emphasis added). Thus, these allegations and arguments contradict plaintiff's contention that she was not on notice that her hostile work environment claim would be considered in defendant's summary judgment motion.

An examination of plaintiff's legal arguments yields a similar conclusion. Specifically, plaintiff argued that she was entitled to rely on the continuing violation doctrine to establish a claim of hostile work environment. *Id.* Acknowledging that the hostile work environment claim "cannot be so easily separated" from her disparate treatment claim, plaintiff further argued that "defendant's effort to separate plaintiff's case into separate theories should be rejected." *Id.* To support that argument, plaintiff cited to the Supreme Court's decision in *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993), a case which considered "whether conduct, to be actionable as *abusive work environment harassment*, must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury." 510 U.S. at 20, 114 S. Ct. 367 (emphasis added).

In yet another section of her Memorandum of Law, plaintiff argued that the continuing violations doctrine was applicable to her hostile work environment claim.

See Pl. Mem. of Law at 13-14. To support that argument, plaintiff cited to the Supreme Court's decision in *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986), a case which dealt with standards for determining the existence of a hostile work environment. In a clear example that plaintiff was on notice that defendant's summary judgment motion addressed the hostile work environment claim, plaintiff then argued:

> [T]he same issues of fact which *preclude summary judgment as to whether a hostile work environment* exists should also preclude summary judgment on the existence of a continuing violation.

Id. at 14 (emphasis added).

Thus, plaintiff's reliance on *Harris* and *Meritor Savings Bank* to establish disparate treatment *and* hostile work environment claims under Title VII demonstrated that she was on notice that defendant's motion for summary judgment addressed the hostile work environment claim.

Defendant's moving papers also notified plaintiff that the hostile work environment claim would properly be addressed by the Court. Specifically, defendant argued that many of the factual assertions underlying plaintiff's hostile work environment claim were time-barred. *See* Def. Mem. of Law at 17. Because plaintiff concedes that many of the factual allegations and arguments predicating plaintiff's disparate treatment and hostile work environment claim were the same, and defendant's moving papers addressed these points, plaintiff had adequate notice that this Court would address the hostile work environment in connection with defendant's motion for summary judgment on the

disparate treatment claim. *See Livingston* v. *Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (holding that sua sponte dismissal is appropriate where plaintiff does not advance a cognizable or colorable claim); *Scottish Air Int'l, Inc.* v. *British Caledonian Group, PLC*, 945 F.2d 53, 54 (2d Cir. 1991) (sua sponte dismissal improper where defendant did not move for summary judgment and plaintiff did not have "adequate notice of the possibility of the entry of summary judgment") (per curiam); *Thompson* v. *Service Merchandise, Inc.*, 1998 WL 559735, at *4 (S.D.N.Y. August 11, 1998) (sua sponte dismissal of Title VII claims appropriate when plaintiff cannot recover as a matter of law).

B. Plaintiff's Verified Complaint and EEO Documents

Plaintiff next argues that her "Verified Amended Complaint" and EEO documents were affidavits within the meaning of Fed. R. Civ. P. 56(e), sufficient to preclude summary judgment on her hostile work environment claim.

Treating plaintiff's Amended Complaint as an affidavit in support of her opposition to summary judgment does not yield a different result. Specifically, plaintiff's argument overlooks that the Court considered the allegations in the Amended Complaint and various EEO documents in considering whether summary judgment should be granted on her hostile work environment claim. *See* Memorandum-Decision & Order at 29-32. Plaintiff appears to argue that the mere existence of a "verified" complaint automatically raises a genuine issue of material fact sufficient to preclude summary judgment. That argument is clearly without merit.

After determining that a majority of the allegations underlying plaintiff's hostile work environment claim were time-barred, and the remaining September 1997 incident was insufficient, as a matter of law, to establish a prima facie claim of hostile work environment, the Court granted defen-dant's motion for summary judgment on that claim. *See id.* at 32. Additionally, the Court properly considered all documents filed with the EEO agency in deciding defendant's summary judgment motion on all of plaintiff's Title VII claims. *See id.* at 33 n.12. Accordingly, plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
OCT 5 2001

No. 01-373

In the Supreme Court of the United States

JOHN E. POTTER, POSTMASTER GENERAL,
Petitioner,

v.

LISA L. FITZGERALD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly apply the "continuing violation" doctrine in considering alleged discriminatory conduct occurring outside of the 45 day limitation period prescribed by 42 USC 2000e-16 (b) and 29 CFR 1614.105 (a)

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

From 1986 through Sept. 25 1997, plaintiff Lisa Fitzgerald was employed as a City Letter Carrier Grade 5 by the United States Postal Service at the Lake Placid Post Office. After August 1994, her immediate supervisor was a man named Timothy Gerling. Ms. Fitzgerald alleges that she was subjected to constant and unrelenting harassment from Mr. Gerling, which resulted in hostile work environment sexual harassment.

From August 1994 through April 1995, Mr.Gerling's harassment was in the form of unwanted sexual advances, including a boast/threat to "father Ms. Fitzgerald's first child". (Petitioner's Appendix, 3a-4a) After these advances apparently ceased in April 1995, Mr. Gerling engaged in an escalating pattern of harassment in the form of discriminatory assignments, "counseling", excessive micromanagement, and verbal and physical intimidation. This harassment culminated in an incident on September 25, 1997, where Ms. Fitzgerald was subjected to a tirade of profanity and finger-pointing. Ms. Fitzgerald walked out of the meeting, and was unable to return to her duties as a postal employee. She alleges that the events of September 25 1997, when considered in the context of the preceeding 2 1/2 years of harassment, were sufficiently severe to constitute a "constructive discharge". Shortly after leaving work, Ms. Fitzgerald was diagnosed as suffering from major depression and post-traumatic stress disorder. She lost 25 percent of her body weight, and suffered from sleeplessness, anorexia and constant nightmares.

On October 24, 1997, Ms. Fitzgerald contacted a Postal Service EEO counselor. Pursuant to 29 CFR 1614.105,

alleged discriminatory conduct that occurred within 45 days of these initial counseling session is deemed to be timely. Therefore, absent the application of the continuing violation doctrine, Ms. Fitzgerald would be limited to complaining about discriminatory conduct that occurred within 45 days of October 24 1997, or actions which occurred after September 9, 1997.

In her complaint, Ms. Fitzgerald asserted claims based on hostile work environment sexual harassment, disparate treatment, and retaliation. The District Court dismissed all of her claims as untimely. The court refused to apply the "continuing violation" doctrine, because it interpreted Second Circuit case law as holding that the continuing violation doctrine only applies to specific "policies or mechanisms". (Petitioner's Appendix 79a-81a) The court rejected plaintiff's claim of constructive discharge because the September 25,-1997 incident was insufficient, by itself, to render plaintiff's working conditions "so intolerable that [she] was forced into an involuntary resignation", quoting Lopez v. SB Thomas Inc., 831 F.2d 1184, 1188 (2d Cir.1987). (Petitioner's Appendix 86a)

B. THE SECOND CIRCUIT'S APPLICATION OF THE CONTINUING VIOLATION DOCTRINE

On appeal, the Second Circuit affirmed the dismissal of Ms. Fitzgerald's claims of disparate treatment and retaliation, but divided Ms. Fitzgerald's claims of hostile work environment sexual harassment into "Phase 1", pertaining to Mr. Gerling's sexual advances in 1994 and 1995, and "Phase 2", consisting of Mr. Gerling's conduct against Ms. Fitzgerald after she rejected his advances, from

1995 through September 25 1997. The Second Circuit found that the continuing violation theory did not apply to Phase 1, inasmuch as the allegations of abusive treatment that occurred within the 45 day period in September 1997 could not be considered to be a continuation of the sexual advances that had been made in 1994 and 1995.

In contrast, the court found that Ms. Fitzgerald's "sworn factual allegations of Gerling's constant stream of unjustified criticisms of her work described specific, related instances of harassment adequate to depict a continuity of allegedly unlawful conduct." (Petitioner's Appendix 38a). "[T]hus, although the final abusive incident on September 25, 1997 was separated from Gerling's final sexual advances by a gap of nearly 2 1/2 years, Fitzgerald's assertions plainly alleged that there was no interruption in the allegedly unwarranted abuse to which she was subjected during that 2 1/2 year Phase 2 period." (Petitioner's Appendix 31a).

The Second Circuit also noted that it was inappropriate for the District Court to focus solely on the September 25, 1997 incident, because Ms. Fitzgerald had alleged that she had been subject to abuse every day, and even the Postal Service had acknowledged that "more than one of the acts fell within the regulatory 45 day limitation." (Petitioner's Appendix 36a-37a).

Finally, the Second Circuit noted that the District Court's dismissal of the constructive discharge claim was based upon its rejection of the continuing violation theory, and held: "the jury could permissively find that as a result of the cumulative effect of his constant abuse and unfair criticism-especially if its severity was escalating, as Fitzgerald asserted-a reasonable person on September 25, 1997, would have found working conditions intolerable." (Petitioner's

Appendix 48a). In other words, a factual question existed with respect to the events that occurred outside of the limitations period, and with respect to a "reasonable person's" perceptions of the September 25 incident.

ARGUMENT

I THERE IS NO BASIS TO HOLD THIS CASE PENDING THE COURT'S DECISION IN NATIONAL PASSENGER RAILROAD CORPORATION v. MORGAN, CASE NO. 00-1614.

A. The interpretation of the continuing violation doctrine at issue in Morgan does not affect the instant case.

In this case, the United States acknowledges that "the decision of the Court of Appeals in this case does not independently warrant plenary review if the Court issues a decision on the merits in Morgan" [National Passenger Railroad Corporation v. Morgan, Case No. 00-1614] (Petition 10) but merely seeks to have this case held for the Court's ultimate decision in Morgan. The instant petition for a writ of certiorari is therefore solely based upon an argument that the Court's decision in Morgan might affect the instant case. However, Morgan is both procedurally and factually distinguishable from Fitzgerald. Furthermore, while Morgan requires the determination of unresolved legal issues pertaining to the question of when a prospective plaintiff should be "on notice" of a potential violation of Title VII, the instant case merely involves the application of well settled law to unique factual circumstances.

The continuing violation doctrine has been consistently recognized by the Court in discrimination cases (cf. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Franks v. Bowman Transportation Co. 424 U.S. 747 (1976), Teamsters v. United States, 431 U.S. 324 (1977), Zipes v. TWA, 445 U.S. 385 (1982), and Bazemore v. Friday, 478 U.S. 385 (1986). In its *amicus* brief in Morgan, the United States acknowledges the viability of the "traditional continuing violation doctrine"[1,2], but nevertheless argues that this doctrine limits recovery for injuries that occurred prior to the limitation. However, this interpretation, even if ultimately credited by the Court, will not affect the instant case, where Plaintiff is seeking to recover for damages as a result of a constructive discharge that occurred within the limitations period, and where her claims are based upon the cumulative effects of a hostile work environment that continued unabated into the limitations period. This is fundamentally different than the United States' characterization of the issue in Morgan, involving the question of whether a plaintiff can use "pre-limitation acts" as "an independent basis for liability". (Petition 10)

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[1] In this case, the United States describes the "traditional rule" as permitting "a plaintiff" to "recover for a violation that occurs within the limitations period, even if the plaintiff knew or should have known of the illegal course of conduct much earlier and outside the limitations period. But the plaintiff may not recover for violations outside the limitations period, even if they are related to the violations within the period." (Petition 10)

[2] Brief for the United States as *amicus curiae* supporting petitioner in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614, p 9. This brief was apparently written by virtually the same attorneys who wrote the petition for writ of certiorari in the instant case.

In Morgan, the Ninth Circuit declined to "adopt a strict notice requirement as the litmus test for application of the continuing violation doctrine", 232 F.3d 1008, 1015 (9th Cir. 2000), and specifically rejected the approach to continuing violation doctrine cases that had been adopted in Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir. 1983) and Galloway v. General Motors, 78 F.3d 1164 (7th Cir. 1996). In Berry, the Fifth Circuit applied a multifactor test to determine whether discrete acts of harassment were sufficiently closely related to satisfy a continuing violation theory. In Galloway, the Seventh Circuit noted "we do not want to encourage premature or precipitate litigation. If the victim of sexual harassment sues as soon as the harassment becomes sufficiently palpable that a reasonable person would realize that she had a substantial claim under Title VII, then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." (78 F.3d at 1166).[3]

Regardless of whether the standards of Galloway or Berry on the one hand, or the more liberal approach utilized by the Ninth Circuit in Morgan and in Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999) and Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998), Ms. Fitzgerald would have been permitted to proceed under a continuing violation theory. Furthermore, it is irrelevant whether Ms. Fitzgerald should have been on notice of the violation, or whether a reasonable person in Ms. Fitzgerald's position would have been on notice of the violation. The violations of law of

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[3] Respondent Fitzgerald cited both Berry and Galloway in her brief to the Second Circuit, and argued that the tests used in both of these cases would support the application of the continuing violations doctrine to her case.

which she complains: the maintenance of hostile work environment sexual harassment, obviously were alleged to be continuing, and obviously continued into the limitations period. In such a case, as the United States notes in its *amicus* brief in Morgan, "a claimant's prior notice of an ongoing Title VII violation does not deprive the claimant of the ability to recover for violations that continue into the charge filing period."[4]

B. The issues pertaining to the application of the continuing violation doctrine in this case are primarily factual.

The question of whether the level of harassment is sufficiently severe to put a reasonable person on notice of the need to complain is a factual question that must, in the context of a motion for summary judgment, be deemed to be resolved in favor of the Plaintiff, the nonmoving party. That is precisely how the Second Circuit approached Ms. Fitzgerald's claim, holding: "a fact finder may consider her evidence that Gerling subjected her to unfair harassment every day during that two and a half year period, as well as her assertion that his harassment during that period escalated. . . . Although Ms. Fitzgerald's failure to seek administrative assistance during that period is a fact that plainly may be considered in weighing her testimony that she was subjected to harassment that was so constant and so abusive as to materially affect her

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[4] Brief for the United States as *amicus curiae* supporting petitioner in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614, p. 11. This brief was apparently written by virtually the same attorneys who wrote the petition for writ of certiorari in the instant case.

working conditions, the weighing of the evidence and the decision as to which of competing inferences is to be drawn is solely within the province of the fact finder." (Petitioner's Appendix 37a)[5]

Ms. Fitzgerald alleged that she had been subjected to continuous harassment for two and a half years, and that this harassment continued into the limitations period. This hostile work environment culminated in her alleged "constructive discharge" on September 25, 1997. This is factually distinguishable from Morgan, where the plaintiff's claims primarily consist of claims arising out of a history of specific acts of discrimination and unequal treatment. The claims of racially-based hostile work environment in Morgan are a small part of the case, and there is no allegation that the hostile environment continually escalated to a constructive discharge.

C. The Second Circuit holding does not raise any legal issues warranting review by this Court.

In holding that Ms. Fitzgerald's claims were actionable under a theory of continuing violation, the Second Circuit did not establish any new law, nor did it make any determination as to what level of notice would be required. Rather, the court merely applied the traditional continuing violation doctrine to hold that a court could consider the events that occurred prior to September 9, 1997 in

[5] In Morgan, the Ninth Circuit's decision was rendered upon an appeal from a judgment after trial; in contrast, in this case, the District Court granted a motion for summary judgment before the commencement of discovery.

determining whether a hostile work environment had been created and maintained during the limitations period. Because this decision did not result in any deviation from established principles of the continuing violation doctrine, it was not necessary for the Second Circuit to consider the level of notice that might have been required, nor was it necessary to discuss, let alone distinguish, the decisions of sister circuits such as Berry and Galloway.

The Second Circuit reversed the District Court because of "doctrinal, factual and procedural difficulties" with the District Court's decision. (Petitioner's Appendix 28a). The "doctrinal" issue concerned the applicability of the continuing violation doctrine to cases "where discrimination is accomplished through a specific official's policy or mechanisms. . ." Butts v. City of New York, 990 F.2d 1397, 1404 (2d Cir. 1993), see also Lambert v. Genessee Hospital, 10 F.3d 46, 53, (2d Cir.1993). The issue of whether such a restriction is an appropriate application of the continuing violation doctrine was the critical issue before the Second Circuit[6]. However, this issue is not the basis for the instant petition for a writ of certiorari, nor does the Justice Department suggest that this issue should be considered by the United States Supreme Court.

Accordingly, the basis of the Second Circuit's ruling is not likely to be affected by the Court's ultimate holding in Morgan, and there are no grounds to hold the petition for a writ of certiorari pending the determination in Morgan.

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[6] The Second Circuit law prior to Fitzgerald, apparently requiring the documentation of a discriminatory "policy", was criticized for adding "an inappropriate extra element to those seeking to prove serial violations", Spriggs, Kent, Representing Plaintiffs in Title VII actions, 2d Ed, Vol.1 p. 9-22.

II THE LEGAL THEORIES ADVANCED BY THE UNITED STATES IN MORGAN ARE INAPPOSITE TO THE INSTANT CASE.

In its *amicus curiae* brief in Morgan, the United States makes three principal arguments: 1) the continuing violation doctrine permits a plaintiff to recover for a violation that occurs within the limitation period even if the Plaintiff knew of the violation earlier, but may not recover for a violation that occurred outside the limitations period, 2) Title VII is consistent with the traditional continuing violations doctrine, even though backpay is limited to the 300 day limitation period, rather than the two-year limitation for backpay specified in 42 USC 2000e-5 (g) (1), and 3) contrary to the Ninth Circuit opinion in Morgan, the Plaintiff may not recover for alleged violations that occurred outside of the 300 day limitations period, even though those actions may be relevant evidence about events that occurred within the limitations period (See Summary of Argument, brief of the United States *amicus curiae* in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614, pp. 9-10).

Even if the Court should accept the United States' arguments in Morgan, such a ruling will not affect Ms. Fitzgerald's claims. Ms. Fitzgerald asserts damages based upon her constructive discharge, an event that clearly occurred within the limitations period. The District Court, in dismissing her claim, viewed the events of September 27, 1997 as an isolated event, because the District Court declined to consider the preceding two and a half years as part of the same pattern of discrimination. The Second Circuit reversed, holding that the events that had occurred, could when viewed together, constitute a "policy" and that the continuing

violation doctrine would apply to such a "policy". This holding is irrelevant to the argument of the United States that no damages can be recovered for pre-limitations period conduct.

Ms. Fitzgerald does not assert a claim for backpay outside of the relevant limitation period. Her claim for backpay after her constructive discharge on September 25, 1997, is, of course, within the limitations period.

Ms. Fitzgerald does have a claim for compensatory damages, including emotional trauma, that result from the maintenance of a hostile work environment. It is by no means clear that United States intends its theory to apply to hostile work environment claims that "usually involve a continuing violation", Waltman v. International Paper Corp., 875 F.2d 468, 476 (8th Cir. 1986) and "turn on the existence of a continuing violation, rather than any individual offensive act." Brown v. Middaugh, 41 F.Supp. 2d 172, 182 (N.D.N.Y. 1999). However, even if a distinction can be drawn between damages for a hostile work environment that occurred within and without the limitation period, a factual question would still exist as to when Ms. Fitzgerald was properly on notice that the hostile environment was actionable, and, for what period of time, if any, she should be precluded from asserting a claim for damages. Regardless of how the Court determines the applicable law with respect to claims for hostile work environment that occurred prior to the limitations period, Ms. Fitzgerald will be able to assert a claim for damages for the hostile work environment that occurred within the limitations period. Therefore, Ms. Fitzgerald's claim for hostile work environment will not be affected, either adversely or beneficially, by the Court's treatment of the arguments advanced by the United States in Morgan.

CONCLUSION

The petition for a writ of certiorari should be denied outright, and not be held pending this Court's decision in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614.

Respectfully submitted,

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Attorney for Respondent
Lisa Fitzgerald

Supreme Court, U.S.
FILED
OCT 26 2001
CLERK

No. 01-373

In the Supreme Court of the United States

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, PETITIONER

v.

LISA L. FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 01-373

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, PETITIONER

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The United States Court of Appeals for the Second Circuit held in this case that conduct outside the applicable 45-day limitations period (*i.e.*, before September 9, 1997) could be a basis for liability under Title VII, 42 U.S.C. 2000e *et seq.*, "because the continuing violation theory is applicable." Pet. App. 37a; see *id.* at 39a-40a. As the petition for a writ of certiorari explained (at 8-10), the Second Circuit's holding squarely implicates the question that is before this Court in *National Railroad Passenger Corporation* v. *Morgan*, No. 00-1614 (granted June 25, 2001).

In *Morgan*, the petitioner-employer has argued "that a Title VII cause of action accrues and the limitations period begins to run when a discrete allegedly discriminatory act occurs," and that "[i]n hostile environment cases in which there is no discrete allegedly discrimi-

natory act, * * * the limitations period runs, at the latest, from the time when the employee knew or should have known of acts sufficient to constitute a violation of Title VII." Pet. Br. 11, 14, No. 00-1614. The dissenting judge in this case made similar arguments. See Pet. App. 46a-54a (Korman, J., dissenting in part). As Judge Korman explained in dissent, respondent did not contact the Postal Service's Equal Employment Opportunity (EEO) office until "well past the time during which a reasonable person would have sought EEO counseling." *Id.* at 54a. If the employer's arguments prevail in *Morgan*, therefore, this Court should grant the petition in this case, vacate the decision of the court of appeals, and remand. Likewise, if the Court adopts the somewhat different analysis suggested by the United States as amicus curiae in *Morgan* (see U.S. Br. at 19-20 & n.7, No. 00-1614), the petition in this case should be granted, the judgment below should be vacated, and the case should be remanded for a determination of when respondent's cause of action accrued for acts that occurred before September 9, 1997. As the petition explained, the proper disposition of this case depends on how *Morgan* is decided.

1. Respondent claims (Br. 4-7) that a notice rule of the sort urged by the employer in *Morgan* would not undermine the Second Circuit's decision in this case. Respondent's argument appears to be that, because she contacted an EEO counselor within 45 days of her alleged constructive discharge on September 25, 1997, all incidents related to that event are actionable without regard to when they occurred. The court of appeals, however, noted (Pet. App. 32a-33a) that respondent had complained about alleged harassment well before September 1997. Despite evidence that respondent had actual notice of her Title VII claim long before she con-

tacted an EEO counselor, the court of appeals allowed respondent to go forward with claims based on all alleged incidents after April 1995. The decision of the court of appeals in this case therefore could not survive under the notice standard that has been proposed by the employer in *Morgan*. Likewise, respondent's efforts to collect damages for alleged acts that occurred before September 9, 1997, even if her hostile work environment claim accrued before that date, is inconsistent with the standard proposed by the United States in its amicus brief in *Morgan*.

2. Respondent further argues (Br. 8) that hostile work environment claims, which feature prominently in this lawsuit, "are a small part of the case" in *Morgan*. That argument lacks merit. The employee in *Morgan* brought a hostile work environment claim, which the Ninth Circuit allowed to go forward under a continuing violation theory. See *Morgan* v. *National R.R. Passenger Corp.*, 232 F.3d 1008, 1017 (9th Cir. 2000) ("[W]e find sufficient evidence to employ the continuing violation doctrine and allow the jury to consider the whole of Morgan's tenure for purposes of liability on his hostile environment claim."), cert. granted, 121 S. Ct. 2547 (2001). Before this Court, the employer in *Morgan* has extensively discussed application of the continuing violation doctrine to hostile-environment claims. See Pet. Br. 38-46, No. 00-1614. The United States also has addressed that issue in *Morgan*. U.S. Br. at 19-20 & n.7, 27, No. 00-1614. Application of the continuing violation doctrine to hostile-environment claims is within the question presented in *Morgan*, and the Court's holding on that issue is likely to control this case.

3. Respondent notes (Br. 9) that *Morgan* does not implicate the district court's reasons for refusing to apply the continuing violation doctrine in this case,

which the Second Circuit rejected. See Pet. App. 81a (holding that continuing violation doctrine is inapplicable because respondent "fail[ed] to allege a formal and ongoing retaliatory policy or mechanism"); *id.* at 28a-30a (rejecting district court holding). The decision at issue in the government's petition is the *court of appeals'* application of the continuing violation doctrine to revive claims that otherwise would be time-barred, *not* the *district court's* refusal to hear those claims. Respondent's focus on the district court's decision is misplaced.

4. Finally, respondent observes (Br. 11) that her claims about alleged incidents that took place within the 45-day limitations period do not depend on the continuing violation doctrine. As the United States explained in the petition (at 10-11), however, respondent seeks to commence discovery and possibly go to trial on claims, arising from alleged events before September 9, 1997, that do depend on the continuing violation doctrine. Rather than allowing litigation of those potentially time-barred claims to proceed under the shadow of *Morgan*, this Court should hold the petition and consider this case with the benefit of the decision in *Morgan*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *National Railroad Passenger Corporation* v. *Morgan*, No. 00-1614, and should be disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

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